PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 07-____ 071489 MAY 27 2008

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,

Petitioners,

v.

HEIDE BETZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Sara B. Brody
Warrington S. Parker, III
Alexander M.R. Lyon
Colin E. Kelley
HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 832-8300

Counsel for Petitioners

May 27, 2008

QUESTIONS PRESENTED

Respondent filed a securities fraud lawsuit based on the allegation that an investment advisor had promised to earn her a sizable return on her investment without touching her principal. Upon opening the investment account, she signed a statement acknowledging that her principal was at risk. She then received dozens of statements showing that her principal was dwindling. But she waited more than four years to sue. The questions presented are:

1. Did the Court of Appeals err in concluding that the statute of limitations begins to run not from the moment the plaintiff is on inquiry notice that there may have been a misrepresentation (as some circuits have held), and not from the subsequent point at which a reasonable investigation would have revealed that she had a possible fraud claim (as other circuits have held), but only from the point at which she receives evidence that the investment advisor intended to defraud her?

2. Did the Courts of Appeals err in holding that an investor who is on inquiry notice that she has a basis for a fraud claim, and is, therefore, obliged to make a reasonable inquiry, may reasonably end her investigation just because the suspected defrauders have made assurances that contradict known facts?

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

Petitioner First Republic Bank is a division of Merrill Lynch Bank & Trust Co., FSB. Petitioner Trainer Wortham & Co., Inc. (now First Republic Investment Management) is a wholly owned subsidiary of Merrill Lynch Bank & Trust Co., FSB. Merrill Lynch Bank & Trust Co., FSB is a wholly owned subsidiary of Merrill Lynch & Co., Inc. No publicly traded company owns more than 10% of Merrill Lynch & Co., Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT (RULE 29.6) ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT STATUTORY PROVISION 2

INTRODUCTION 3

STATEMENT 5

Respondent Claims Petitioners Promised a Big Return Without Touching Her Principal 5

Betz Knows Trainer Wortham Was Touching the Principal 6

Betz Gets Assurances—But the Principal Continues to Plummet 8

Betz Threatens to Sue In July 2002, But Does Not Sue Until July 2003 9

The District Court Dismisses Betz's Claim as Time Barred 10

The Ninth Circuit Reverses 11

REASONS FOR GRANTING THE WRIT..... 14

I. THE NINTH CIRCUIT DEEPENED AN EXISTING SPLIT AND CREATED ANOTHER ABOUT THE STATUTE OF LIMITATIONS FOR SECURITIES FRAUD..... 15

A. The Circuits Are Fractured Over When the Statute of Limitations for Securities Fraud Begins to Run. 15

1. The other circuits have developed four different standards, all revolving around a plaintiff's discovery that a representation might be false. 15

2. Departing from every other circuit, the Ninth Circuit holds that direct evidence of a falsehood does not place a plaintiff on inquiry notice.....19

B. The Ninth Circuit Created a Circuit Split By Holding that an Investor Who Is on Inquiry Notice May Reasonably Rely on Assurances from the Suspected Defrauder, Even Though the Assurances Contradict Known Facts. 24

II. THIS CASE PRESENTS ISSUES OF PROFOUND NATIONAL IMPORTANCE..... 31

CONCLUSION..... 34

APPENDICES

Court of Appeals Opinion (Feb. 26, 2008)..... 2a

Court of Appeals Order Amending Opinion and Denying Rehearing En Banc (Feb. 26, 2008) ... 25a

Court of Appeals Opinion (Oct. 4, 2007) 41a

Court of Appeals Order Granting Rehearing (Sept. 14, 2007) 64a

Court of Appeals Opinion (May 11, 2007) 67a

District Court Opinion 88a

TABLE OF AUTHORITIES

Page

Cases

Addeo v. Braver,
956 F. Supp. 443 (S.D.N.Y. 1997) 25

Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,
483 U.S. 143 (1987) 32

Bailey v. Cumberland Cas. & Sur. Co.,
180 Fed. Appx. 862 (11th Cir. 2006) 16

Betz v. Trainer Wortham & Co.,
519 F.3d 863 (9th Cir. 2008) 1

Brumbaugh v. Princeton Partners,
985 F.2d 157 (4th Cir. 1993) 19, 22, 23

Caviness v. Derand Res. Corp.,
983 F.2d 1295 (4th Cir. 1993) 17

Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.,
129 F.3d 222 (1st Cir. 1997) 22, 23, 25

DeBenedictis v. Merrill Lynch & Co.,
492 F.3d 209 (3d Cir. 2007) 21, 22

Dodds v. Cigna Sec., Inc.,
12 F.3d 346 (2d Cir. 1993) 19, 21, 23

Dura Pharm., Inc. v. Broudo,
544 U.S. 336 (2005) 34

Franze v. Equitable Assurance,
296 F.3d 1250 (11th Cir. 2002) 16

Fujisawa Pharm. Co. v. Kapoor,
115 F.3d 1332 (7th Cir. 1997) 17, 23, 24, 33

Great Rivers Coop. v. Farmland Indus., Inc.,
120 F.3d 893 (8th Cir. 1997) 17, 26

In re Exxon Mobil Corp. Sec. Litig.,
387 F. Supp. 2d 407 (D.N.J. 2005) 27

Jensen v. Snellings,
841 F.2d 600 (5th Cir. 1988) 17

Jones v. R.R. Donnelley & Sons Co.,
541 U.S. 369 (2004) 31

Kennedy v. Josephthal & Co.,
814 F.2d 798 (1st Cir. 1987) 24

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,
501 U.S. 350 (1991) 4, 31, 32

LC Capital Partners LP v. Frontier Ins. Group, Inc.,
318 F.3d 148 (2d Cir. 2003) 18, 26, 28

Mathews v. Kidder, Peabody & Co.,
260 F.3d 239 (3d Cir. 2001) .....passim

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 34

New England Health Care Employees Pension Fund v. Ernst & Young LLP,
336 F.3d 495 (6th Cir. 2003) 17, 22

Ritchey v. Horner,
244 F.3d 635 (8th Cir. 2001) 22

SEC v. Seaboard Corp.,
677 F.2d 1301 (9th Cir. 1982) 26

Slavin v. Morgan Stanley,
791 F. Supp. 327 (D. Mass. 1992) 26

Sterlin v. Biomune Sys.,
114 F. Supp. 2d 1163 (D. Utah 1999) 27

Sterlin v. Biomune Sys.,
154 F.3d 1191 (10th Cir. 1998) ..... passim

Stoneridge Invest. Partners, LLC v. Scientific-Atlanta, Inc.,
128 S. Ct. 761 (2008) 33

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
127 S. Ct. 2499 (2007) 33

Tello v. Dean Witter Reynolds, Inc.,
410 F.3d 1275 (11th Cir. 2005) 19, 21, 23

Theoharous v. Fong,
256 F.3d 1219 (11th Cir. 2001) 16

Topalian v. Ehrman,
954 F.2d 1125 (5th Cir. 1992) 21, 23

Tregenza v. Great Am. Communications Co.,
823 F. Supp. 1409 (N.D. Ill. 1993) 25

Volk v. D.A. Davidson & Co.,
816 F.2d 1406 (9th Cir. 1987) 33

Whirlpool Fin. Corp. v. GN Holdings,
67 F.3d 605 (7th Cir. 1995) 21, 26, 27

Wyser-Pratte Mgmt. Co. v. Telxon Corp.,
413 F.3d 553 (6th Cir. 2005) 23

Young v. Lepone,
305 F.3d 1 (1st Cir. 2002) 17

Statutes

15 United States Code
§ 78j(b) 9

28 United States Code
§ 1254 1

28 United States Code
§ 1658..... 2, 4, 31

Rules

Securities and Exchange Commission
Rule 10b-5, 17 C.F.R. § 240.10b-5 9

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The final opinion of the United States Court of Appeals for the Ninth Circuit and the dissent from the denial of the petition for rehearing en banc, dated February 26, 2008, are reported at *Betz v. Trainer Wortham & Co.*, 519 F.3d 863 (9th Cir. 2008), and are reproduced in the Appendix to this Petition (App.) at 2a and 25a, respectively. The original, now withdrawn, opinion of the Court of Appeals, dated May 11, 2007, is reproduced at App. 67a. The opinion that followed, which is also now withdrawn, dated October 4, 2007, is reproduced at App. 41a. The opinion of the United States District Court for the Northern District of California, dated April 5, 2005, is unpublished and is reproduced at App. 88a.

STATEMENT OF JURISDICTION

The Court of Appeals entered an opinion on May 11, 2007, reversing the District Court's grant of summary judgment in favor of Petitioners. A timely petition for rehearing was granted and the Court of Appeals issued a new opinion on October 4, 2007. A timely petition for rehearing en banc was denied on February 26, 2008. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY PROVISION

This case revolves around interpretation of 28 U.S.C. § 1658, which provides:

Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [enacted December 1, 1990] may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

INTRODUCTION

"Here we are, out in left field again." App. 28a. So began Chief Judge Kozinski's dissent from the denial of rehearing en banc. His dissent qua cert. petition is right. The Ninth Circuit confronted a split among multiple circuits. But instead of choosing sides, it staked out an extreme position that (to quote the dissent) "[n]o other court in the known universe has adopted." App. 31a.

Even before the Ninth Circuit issued its opinion, the courts of appeals were in disarray as to when the statute of limitations on a securities fraud claim begins to run. Outside the Ninth Circuit, the courts had devised four different approaches. In one camp, the statute of limitations begins to run when a plaintiff is on inquiry notice, i.e., the moment the plaintiff knows enough facts to suggest the *possibility* of fraud. Another camp holds that inquiry notice does not trigger the statute of limitations; the statute of limitations does not begin to run until a reasonable person who is on inquiry notice should have uncovered the facts sufficient to bring a securities fraud case. In yet another camp, the standard depends not just upon when an objectively reasonable person would have discovered the facts, but upon whether or not the plaintiff in question actually made the requisite inquiry. In this fractured legal landscape, a plaintiff could hit the jackpot or hit the road, depending on where he chooses to sue.

For all their differences, these circuits all agree on two important principles—both of which the Ninth Circuit rejected.

First, ten circuits have held that the duty to inquire is triggered when the plaintiff has reason to suspect that the representations on which she relied are false. The Ninth Circuit entered the fray with a "unique interpretation of the statute of limitations" that rejects this consensus. App. 28a. According to the Ninth Circuit, a plaintiff need not so much as ask a question even after receiving definitive proof that the promise on which she relied was false. In the Ninth Circuit, the obligation to ask a question never arises until proof of scienter—proof that the purveyors of the blatantly false promise intended to defraud her—falls in her lap.

Second, other circuits agree that the inquiry notice standard entails a duty to conduct a *reasonable* investigation, and that it is unreasonable to rely on a suspected defrauder's vague assurances, at least when those assurances contradict known facts. The Ninth Circuit, in contrast, has held that it is permissible to rely on such assurances, even where they contradict known facts.

Even before Congress imposed a uniform two-year statute of limitations for securities fraud claims, *see* 28 U.S.C. § 1658(b), this Court underscored how critical nationwide uniformity is. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991).

Any semblance of uniformity is illusory when different circuits start the two-year clock on different dates. The current regime is a forum-shopper's dream. But it is a nightmare for any business that needs to manage risks, and for any investor who wants to know what the rules are.

The circuit splits are as intractable as they are detrimental. To restore uniformity, this Court must intervene to pronounce a uniform rule for all securities fraud cases.

STATEMENT

Respondent Claims Petitioners Promised a Big Return Without Touching Her Principal

Respondent Heide Betz is a 25-year veteran of the business world. She has invested in real estate ventures and has made a living in the "speculative" arena of art investments. ER 278-87.[1] She describes her occupation as "investor," on her tax returns. ER 365, 370. This case concerns one of Betz's less successful investments.

Betz invested $2.2 million in 1999 with Petitioner Trainer Wortham, then a subsidiary of First Republic Bank. Like many investments in that volatile period, Betz's investment declined in value as the stock market plummeted. App. 91a. She sued Petitioners

---

[1] "ER" refers to the Excerpts of Record that Betz filed in the Ninth Circuit with her Appellant's Brief.

seeking to recover her entire original investment, insisting that she had been promised a hefty return, completely risk-free.

According to Betz, Trainer Wortham investment advisor David Como promised "he would not touch the principal," but could nevertheless produce a healthy $15,000 per month return on her investment. App. 4a. It was the sort of promise one finds only in fairy tales, right before a bearded gnome with a strange name shows up to spin straw into gold.

Betz's securities fraud suit rests entirely on the simple claim that this oral promise was false—that Trainer Wortham did, indeed, "touch" the principal. There is no dispute that Betz knew very early on that Trainer Wortham was breaking the supposed promise. The dispute here is over whether the two-year statute of limitations began to run when she learned that fact, or at some later point.

Betz Knows Trainer Wortham Was Touching the Principal

Before ever handing a penny to Trainer Wortham, Betz acknowledged that she knew no one was promising to spin straw into gold or otherwise produce a princely return without touching her principal. If, indeed, Como had made such a promise, the "Letter of Understanding for Portfolio Management and Administrative Services" confirmed it was false. The Letter, which Betz signed, announced that "the account is . . . subject to investment risk and *a possible loss of principal*." App. 32a

(emphasis added), 69a. Betz even confirmed that she "understands that no guarantees with respect to the success of the management of the assets can be given." ER 383.

If the contract Betz signed was not enough to convey that Trainer Wortham would be touching the principal—contrary to any supposed promise of risk-free returns—the subsequent account statements emphasized the point, several dozen times. At least once a month Trainer Wortham sent Betz a detailed account statement. App. 5a. Each showed the principal remaining in the account. Starting in February 2000 and continuing through 2001, the periodic statements reflected a principal below $2.2 million, which meant that Betz's principal was being touched again and again. App. 5a. Almost every account statement from February 2000 through December 2001 showed a decline of at least $100,000, and up to $400,000, from the previous statement. ER 466-593. Betz received 39 statements in all during that 23-month period, because she requested more frequent account statements to ensure she "could look at the bottom line of [her] account." ER 319.

As Betz acknowledges, that is exactly what she did. By May 2000, within three months of the first decline, Betz began to raise alarm bells about her declining principal. Betz contacted Petitioner Robert Vile, another Trainer Wortham investment advisor, and (as she put it) "express[ed] my concern about the drop in my portfolio which was at 1.8 million, $400,000 less than my original investment." ER 317-18, 328-

29, 373. In January 2001, Betz again expressed alarm that her principal was plummeting, "from 1.3 million, almost a million less than I had originally invested." ER 329-33, 373. In March 2001, Betz visited Vile to express her "total dismay of my portfolio which was now at $848,000." App. 91a. By December 31, 2001, Betz's principal dwindled to $467,948, one-fifth of its original value. ER 541-42.

Betz Gets Assurances—But the Principal Continues to Plummet

At the meeting in March 2001, Vile blamed the market for the erosion of Betz's principal. She claims he assured her "that the market would recover, and that in a year or less the balance would be back to $2.2 million." App. 5a.

It turns out Vile did not have magical powers over the stock market. Betz's principal continued to decline. Also in March 2001, Betz met with the First Republic employee who had first introduced her to Trainer Wortham, Carmen Castro. Castro admitted there was a "serious problem" with the account and "the way that it was being handled by Trainer Wortham." ER 350-55. According to Betz, she was assured that Trainer Wortham would "take care of the account because it was 'the right thing to do.'" App. 5a.

Despite the assurances, Betz's principal continued to evaporate. The account statements continued to reflect a principal amount that was far less than the $2.2 million originally invested. On February 28, 2001, just before the first

conversation, the principal was $848,125. App. 5a. By June 30, four months later, it had dropped another $200,000, to $641,842. ER 562-63. Obviously, no one took "care of the account."

Betz Threatens to Sue In July 2002, But Does Not Sue Until July 2003

Over the next year, Betz continued to receive account statements, and the statements continued to report an ever-dwindling principal.

In May 2002, Betz met with Trainer Wortham's president. App. 5a. That same month, Betz claims that Castro told her that the president would be meeting with "other principals and attorneys" about her account. *Id.* Castro urged Betz to be "patient . . . and not take any legal action." *Id.*

In June 2002, Castro advised Betz that Trainer Wortham would not compensate her for her market losses. ER 707. A month later, on July 23, 2002, Betz's lawyer threatened to sue within 10 days. App. 92a.

A year passed. On July 11, 2003, Betz finally sued Petitioners for securities fraud. App. 6a; *see* Securities and Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. Betz claimed that Como's alleged June 1999 oral promise—she called it the "oral Portfolio Management Agreement"—was fraudulent. ER 19.

Betz filed her lawsuit more than four years after the alleged promise of June 1999—and four years after she signed the Letter acknowledging

that any such promise would have been false. She filed three and a half years after she knew for sure, in February 2000, that her principal was being "touched." It was three years and two months after Betz spoke to Vile about her concerns, in May 2000. It was three years and one month after it was clear that Vile was not addressing her concerns when the next account statement arrived, in June 2000.

The District Court Dismisses Betz's Claim as Time Barred

Petitioners moved for summary judgment on the ground that Betz's claim was barred by the two-year statute of limitations. *See* 28 U.S.C. § 1658(b). For purposes of the motion, the parties did not dispute what Betz knew and when she knew it. The dispute revolved entirely around the proper legal standard for when the statute of limitations begins to run, and what a reasonable investor would have done with the information Betz had.

The District Court granted summary judgment in favor of Petitioners, agreeing that Betz's securities fraud claim was time barred. Applying an inquiry notice standard, the District Court concluded that the account statements Betz received between February 2000 and March 2001 placed her on inquiry notice that she might have a claim for securities fraud, because they "directly contradicted the alleged oral representation made by defendants." App. 100a-101a. According to the court, these "storm warnings" would have caused "a reasonable

investor of ordinary intelligence" to investigate. App. 101a.

The court further held that Betz had not exercised reasonable diligence in investigating the possibility of fraud. The court concluded that Petitioners' various assurances did not stop the statute of limitations from running. App. 103a. Based on this, the court concluded that the statute of limitations began to run no later than March 2001—when Betz actually confronted several Trainer Wortham employees about her account—more than two years before Betz filed her lawsuit. App. 103a.

The Ninth Circuit Reverses

The Ninth Circuit issued three published opinions, each superseding the previous one. All reversed the grant of summary judgment on Betz's securities claim.

The first opinion acknowledged the unanimous view among the circuits that the statute of limitations incorporates an inquiry notice standard, and embraced that consensus. App. 75a. The court then purported to adopt the prevailing version of the standard—the two-part "inquiry-plus-reasonable-diligence test"—to determine when the statute of limitations begins to run. App. 79a.

Under this test, the first task is to determine whether a putative plaintiff is on inquiry notice. A plaintiff is on inquiry notice when there is "sufficient suspicion of fraud to cause a reasonable investor to investigate the matter

further." *Id.* The second part of the test dictates when the statute of limitations begins to run. Once a plaintiff is on inquiry notice, the statute of limitations begins to run when an investor, "in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." *Id.*

The court said that the test was objective—which is to say that it is based on a hypothetical reasonable investor. App. 80a. But in the next breath, the court noted that the standard could not be entirely objective. "[T]he particular circumstances of the plaintiff" had to be taken into account. *Id.*

On the first prong, the court concluded that Betz was not on inquiry notice when she knew that her principal was melting away. App. 82a-83a. The court concluded that the information known to Betz "at most" showed that Petitioners had "broken their promise." App. 83a. "[A]s a matter of law," a declining account balance "would [not] have spurred a reasonable investor to further inquire whether he or she had been *defrauded*." *Id.* (emphasis in original). According to the Court of Appeals, that was not enough even to make a reasonable investor inquire why it was happening. The court held that even Trainer Wortham's admission that there was a "serious problem" with the way Betz's account was being handled did not place Betz on inquiry notice. *Id.* A reasonable investor hearing that statement could not be expected to inquire further (or at all), the court held, because that admission provided no

"evidence that [Petitioners] intentionally or deliberately and recklessly misled" Betz. *Id.*

The court also issued an alternative holding, focused on the second prong. It concluded that even if the facts were sufficient to make a reasonable investor inquire, the statute of limitations did not begin to run, because a reasonable juror could conclude that the responses to Betz's inquiries sufficed to allay any concerns. App. 84a. The court found that Betz was a naïve investor who was easily misled by the assurances of Petitioners. App. 84a-85a (noting that a naïve investor, like Betz, was entitled to rely on the assurances, whereas "a sophisticated investor . . . would not normally be entitled to any equitable tolling of the limitations period").

Petitioners filed a timely petition for rehearing and rehearing en banc. The panel granted the petition for rehearing, issuing a second opinion that superseded the first. App. 42a-62a. In its second opinion, the Ninth Circuit reaffirmed the "two-part notice-plus-reasonable-diligence test." App. 56a. But the court excised from the opinion the holding that the statute of limitations depended on the investor's naïvete or sophistication. App. 56a-57a. It also removed the holding that Petitioners' assurances tolled the statute of limitations. App. 55a.

In place of this analysis, the court concluded that the determination "whether the plaintiff exercised reasonable diligence[,] . . . while remaining essentially objective in character,

necessarily entails an assessment of the plaintiff's particular circumstances from the perspective of a reasonable investor." App. 56a. Applying this standard, the court found that, even if Betz had been on inquiry notice, the court could not conclude as a matter of law that the statute of limitations had started running. In light of Petitioners' assurances, a jury could conclude that Betz could not have "discovered the facts constituting the alleged fraud." App. 60a.

Apart from this revision, the analysis and result remained the same.

Petitioners filed another timely petition for rehearing and rehearing en banc. The panel reissued its opinion with two minor changes, App. 25a-27a, and the full court denied rehearing en banc. App. 27a-28a.

Chief Judge Kozinski wrote a dissent from the denial of rehearing en banc that Judges O'Scannlain and Bea joined. The dissent identified three respects in which the Ninth Circuit's opinion is at odds with the holdings of ten other circuits, ultimately protesting that the panel had reduced the statute of limitations to nothing but a "filigree on the statutory page." App. 39a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for two reasons. First, the Ninth Circuit drastically intensified an existing circuit conflict, and created another, over when the statute of

limitations begins to run for securities fraud. Second, these circuit splits concern matters of profound national importance.

I. THE NINTH CIRCUIT DEEPENED AN EXISTING SPLIT AND CREATED ANOTHER ABOUT THE STATUTE OF LIMITATIONS FOR SECURITIES FRAUD.

The circuits are in conflict over two issues that are central to the statute of limitations in a securities fraud case. The first relates to when the statute of limitations begins to run. The second concerns what constitutes a "reasonable inquiry" once an investor is on inquiry notice.

A. The Circuits Are Fractured Over When the Statute of Limitations for Securities Fraud Begins to Run.

Even before the Ninth Circuit issued its opinion in this case, the courts of appeals were fractured over the standard for determining when the statute of limitations begins to run on a securities fraud claim. The Ninth Circuit has deepened the confusion with a unique standard that is profoundly at odds with all the others.

1. The other circuits have developed four different standards, all revolving around a plaintiff's discovery that a representation might be false.

Before the Ninth Circuit entered the fray, ten of the other regional circuits (all but the D.C. Circuit) had devised four different tests for when the statute of limitations begins to run on a

securities fraud case. *See, e.g., Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1201 (10th Cir. 1998) (discussing the variations).

Approach 1 is what might be called "pure inquiry notice." In the Eleventh Circuit, the statute of limitations begins to run the moment a plaintiff is placed on inquiry notice that a representation may be false. *See Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001); *see also Bailey v. Cumberland Cas. & Sur. Co.*, 180 Fed. Appx. 862, 864 (11th Cir. 2006). Specifically, the two-year clock begins to run once a plaintiff has "knowledge of facts that would lead a reasonable person *to begin* investigating *the possibility* that his legal rights had been infringed." *Theoharous*, 256 F.3d at 1228 (emphasis added). Under this test, it does not matter that it could take more than two years to suss out the fraud or determine its scope. The clock starts ticking the moment the plaintiff learns facts that would cause a reasonable person to investigate. *See id.* (statute of limitations began to run when defendant declared bankruptcy); *Franze*, 296 F.3d at 1254 (statute of limitations began to run when plaintiffs received documents contradicting representations); *Bailey*, 180 Fed. Appx. at 864-65 (same).

Approach 2—the majority rule, followed by the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits—adds an extra hurdle to a statute of limitations defense. Instead of starting the clock when the plaintiff is on

inquiry notice, these circuits add a grace period of sorts. The clock does not start running until two factors are satisfied: (1) the plaintiff is on inquiry notice; *and* (2) the plaintiff, "in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud." *Sterlin*, 154 F.3d at 1201; *see, e.g.*, *New England Health Care Employees Pension Fund v. Ernst & Young LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Great Rivers Coop. v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1303 (4th Cir. 1993); *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988).

Approach 3—followed by the Seventh Circuit—is similar to Approach 2, with a twist that seems to give plaintiffs even more time. The court does not articulate the test as a two-part test. But like Approach 2, it runs the statute of limitations not from the time when a plaintiff is put on inquiry notice that a representation was false, but from the time the plaintiff should have discovered the facts with reasonable diligence: "The facts constituting [inquiry] notice must be sufficiently probative of fraud . . . not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the investigation in time to file a timely suit." *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (Posner, C.J.). It is not, however, clear whether the sort of investigation that enables a plaintiff "to tie up any loose ends" (under Approach 3)

takes longer than the investigation necessary merely to "discover[] the facts underlying the alleged fraud" (under the Approach 2).

Approach 4—followed by the Second and Third Circuits—is a hybrid of Approaches 1 and 2. *See LC Capital Partners LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252-55 (3d Cir. 2001). Under this hybrid approach, when the clock starts to run depends upon whether the plaintiff actually conducts an investigation. If the plaintiff is on inquiry notice that a representation was false and does not make any inquiry, the statute of limitations begins to run from the moment he was put on inquiry notice (like Approach 1). If, however, the plaintiff does make an inquiry, the statute of limitations does not begin to run until a reasonably diligent plaintiff should have discovered the facts necessary to bring a securities fraud claim (like Approach 2).

The difference in approach, even among these circuits, can be outcome determinative. If Betz had sued Petitioners in Atlanta, the question would be when she was on notice that the promise might have been false. If she had sued in New York or Philadelphia, the question would be whether she exercised reasonable diligence after that point. If she had sued in Chicago, the question would be when she should have "tied up the loose ends." But in other cities—from Albuquerque to Boston to Cleveland to Des Moines—the question would be when a reasonable person knowing what Betz knew

would "have discovered the facts underlying the alleged fraud," without regard to what Betz herself actually did.

As different as the four approaches are, they all share one feature: They all begin with the premise that a plaintiff is on inquiry notice when she learns facts suggesting that a defendant's challenged representations were false. The test is whether the facts known to a plaintiff raise "the *possibility* of a fraud," *Sterlin*, 154 F.3d at 1203 (emphasis added), so that "an investor of ordinary intelligence" would *investigate* whether he or she had been defrauded; and every one of these circuits consider evidence that a statement or promise was false to be enough to trigger inquiry notice. *See, e.g., Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1283 (11th Cir. 2005); *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162-63 (4th Cir. 1993).

2. Departing from every other circuit, the Ninth Circuit holds that direct evidence of a falsehood does not place a plaintiff on inquiry notice.

The Ninth Circuit, in this case, purported to adopt Approach 2, what it called a "two-part notice-plus-reasonable-diligence test." App. 17a. But the Ninth Circuit has defined its inquiry notice standard in a way that is different from every circuit, yielding yet a fifth test—and one that departs radically from the standards applied in all the other circuits. The Ninth Circuit has held that a plaintiff is not on inquiry

notice just because she discovers evidence that suggests a possible falsehood. Indeed, the Ninth Circuit has held that a plaintiff has no obligation to ask the first question, even if she has definitive proof that the challenged representation was false. In the Ninth Circuit, the clock does not start ticking until the plaintiff discovers "evidence that the defendants had intentionally or deliberately and recklessly misled [her]." App. 21a. And since the plaintiff has no obligation to inquire until such evidence materializes, the rule in the Ninth Circuit is that a plaintiff with definitive evidence of a falsehood can sit on her hands waiting for evidence of fraudulent intent to fall in her lap like manna from Heaven.

In keeping with its new rule, the Ninth Circuit held that explicit contractual provisions contradicting the promise were not enough to give rise to a duty to inquire. *Id.* Nor were "the account statements," because they "indicated, at most, that defendants had failed to fulfill their oral promise that Betz could withdraw $15,000 per month from her account without depleting the principal." App. 20a. Without the requisite proof of scienter, Betz was not even expected *to inquire.* It was this holding that led Chief Judge Kozinski to protest that, in the Ninth Circuit, "[n]otice that *actually* causes the investor to make inquiries is nevertheless insufficient to put a reasonable investor on notice to make inquiries," and to exclaim that "[n]o other court in the known universe has adopted such an oxymoronic rule." App. 31a.

The rule everywhere else in the known universe—or at least everywhere else in the nation—is the one recited above, that a plaintiff is obliged to inquire upon learning facts that raise "the *possibility* of a fraud." *Sterlin*, 154 F.3d at 1203 (emphasis added). A "full exposition of the scam itself" is not required. *Id.* at 1203; *see also Tello*, 410 F.3d at 1282. "[T]he discrepancies [need not] prove[] fraud, but simply [cause] a reasonable investor [to] believe[] that fraud was a possible explanation." *Whirlpool Fin. Corp. v. GN Holdings*, 67 F.3d 605, 610 (7th Cir. 1995). Discovery that a statement or promise was false is always enough to trigger at least a duty to inquire, if not actual notice of a fraud.

To take the starkest example, in all these other circuits, a plaintiff who believes that the defendants promised her a safe, conservative investment is on inquiry notice the moment she learns facts that directly contradict that promise. For example, such a plaintiff is on inquiry notice as soon as she receives a prospectus that says that the investment is risky and illiquid. *Dodds*, 12 F.3d at 351; *see also Topalian v. Ehrman*, 954 F.2d 1125, 1132-34 (5th Cir. 1992) (same).

But in these other circuits, inquiry notice is triggered even in the absence of a direct contradiction, when the plaintiff observes nothing but "storm warnings," subtler clues that cast doubt on the truthfulness of a representation. *E.g.*, *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007);

Ritchey v. Horner, 244 F.3d 635, 639 (8th Cir. 2001). For example, a plaintiff who was told he would get a tax write-off from an investment is on inquiry notice when a later document "warned of the *possibility* that the IRS would disallow the tax deductions." *Brumbaugh*, 985 F.2d at 162 (emphasis added). Similarly, a plaintiff who is told that his investment is low-risk is on inquiry notice when he receives a 12% rate of return and a drastic short-term decline in value, *see Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 129 F.3d 222, 224 (1st Cir. 1997), or when the investment takes volatile swings, *see Mathews*, 260 F.3d at 254; *see also New England Health Care Employees Pension Fund*, 336 F.3d at 501 (plaintiff had sufficient facts showing that company was struggling). Even a news report about the riskiness of a particular investment can suffice to put the plaintiff on inquiry notice. *See DeBenedictis*, 492 F.3d at 216; *Sterlin*, 154 F.3d at 1204 (article in magazine that principal of defendant was known to have sketchy business arrangements in past dealings placed plaintiff on inquiry notice).

These are just a few illustrations of the Ninth Circuit's direct clash with clear holdings of other circuits on similar facts. But as Chief Judge Kozinski points out, "[f]ive other circuits have dealt with cases" exactly like this one, "where investors claimed they were hoodwinked by promises that their dollars would multiply like bunnies with absolutely no risk." App. 31a. "All five held that the statute of limitations was

triggered as soon as the investors found out they lost money, if not before." App. 31a-32a. "Had Betz lived in Boston or Philadelphia, she would have been on inquiry notice by" the time "her account had lost half its value, and the bank had confirmed that those losses were real." App. 32a (citing *Mathews*, 260 F.3d at 254; *Cooperativa de Ahorro*, 129 F.3d at 224). "Had Betz lived in New York, Baltimore or Houston, she would have been on inquiry notice as soon as she opened her account and received the bank's 'Letter of Understanding,' which . . . contradict[ed] . . . the alleged oral promise." App. 32a (citing *Dodds*, 12 F.3d at 352; *Brumbaugh*, 985 F.2d 163; *Topalian*, 954 F.2d 1134).

As if to make the point even more starkly, several of these circuits have explicitly rejected the premise on which the Ninth Circuit based its holding, "that the statute of limitations doesn't begin to run until the victim has in hand *all* the facts he needs in order to bring suit immediately." *Fujisawa*, 115 F.3d at 1334; *see also Brumbaugh*, 985 F.2d at 162 ("Commencement of a statute of limitations period need not, however, await the dawn of complete awareness."); *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 564 (6th Cir. 2005) (plaintiff "may not delay the commencement of the statute of limitations until after it has secured direct evidence of [the defendant's] culpability"); *Tello*, 410 F.3d at 1283 (inquiry notice does not depend on "[f]ull exposition of the scam" itself); *Dodds*, 12 F.3d at 352 ("An investor

does not have to have notice of the entire fraud being perpetrated to be on inquiry notice."); *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802 (1st Cir. 1987) (plaintiff "need not . . . have fully discovered the nature and extent of the fraud before they were on notice that something may have been amiss."). As Chief Judge Posner explained: "On this view, the potential plaintiff can complete his investigation, draft his complaint, and put the complaint in a drawer to be taken out in a year and filed if the price of the stock has fallen." *Fujisawa*, 115 F.3d at 1334.

B. The Ninth Circuit Created a Circuit Split By Holding that an Investor Who Is on Inquiry Notice May Reasonably Rely on Assurances from the Suspected Defrauder, Even Though the Assurances Contradict Known Facts.

The Ninth Circuit issued an alternative holding in support of the denial of summary judgment. This holding revolves around the second prong of its two-pronged analysis. As noted above, in the Ninth Circuit, as in most circuits, the statute of limitations does not begin to run the moment the plaintiff is on inquiry notice; rather, inquiry notice obliges the plaintiff to embark on a reasonable inquiry. The Ninth Circuit held that, even assuming Betz was on inquiry notice, the statute of limitations did not begin to run because the inquiry she conducted was reasonable. App. 21a-22a. Specifically, the court held that a jury could conclude that it was reasonable for Betz to have suspended her

inquiry upon hearing "assurances" from the very people she should have suspected of fraud. App. 22a. Chief Judge Kozinski characterized this holding as being "as bad as the first, perhaps worse," correctly noting that "no other circuit has hacked this gaping hole into the statute of limitations." App. 39a.

The Third Circuit and the Eighth Circuit have both held that it is categorically unreasonable to rely on a suspected swindler's self-serving solace. They reason that "even an investor of ordinary judgment and experience can discern that there is some risk in limiting inquiry to the very broker who may have misled or even defrauded the investor." *Cooperativa de Ahorro,* 129 F.3d at 225; *see Mathews,* 260 F.3d at 255. Any swindler unscrupulous enough to pull off a fraud in the first place would have no qualms about trying to allay suspicions or defer confrontation. Thus, these courts hold, it would be unreasonable for a victim who is on inquiry notice to suspend the inquiry just because an Artful Dodger chirps reassuring platitudes. *See also Addeo v. Braver,* 956 F. Supp. 443, 451-52 (S.D.N.Y. 1997) (once a plaintiff is "left with reason to be suspicious of defendant, it [is] no longer reasonable for them to defer to [defendant's] representations"); *Tregenza v. Great Am. Communications Co.,* 823 F. Supp. 1409, 1416 n.6 (N.D. Ill. 1993) ("inquiring of the same broker suspected of having misrepresented information seems neither prudent nor diligent"); *Slavin v. Morgan Stanley,* 791 F. Supp. 327, 331 (D. Mass. 1992) (plaintiff did not

exercise reasonable diligence by writing defendants a letter and then relying on their response denying wrongdoing).[2]

Other courts—including the Seventh Circuit and the Second Circuit—have not stated the rule quite so categorically. But they have held that it is unreasonable to ignore *known facts* based on a suspected schemer's assurances. *See LC Capital Partners*, 318 F.3d at 155-56; *Whirlpool Fin. Corp.*, 67 F.3d at 610; *see also Great Rivers Coop.*, 120 F.3d at 898 (Eighth Circuit, which has articulated the more categorical rule, has also concluded that a defendant's "self-serving statements about the invalidity of the suit do not . . . negate the other pertinent information" that alerted investors to potential problems). These circuits understand that just because a suspected defrauder tries to paint a smiley face on the situation does not entitle the suspicious party to turn a blind eye to the information that

---

[2] There are, of course, cases that hold that the statute of limitations may be tolled when a defendant interferes with a plaintiff's investigation by lying about the *facts exclusively within its possession* in response to hard questions. *See, e.g., Mathews*, 260 F.3d at 256. While citing one such case, the Ninth Circuit did not purport to apply that doctrine. *See* App. 22a (citing *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1309-10 (9th Cir. 1982)). Betz has never invoked it, presumably because Petitioners never did anything to hide facts or in any other way prevent Betz from learning that the supposed promise was untrue. App. 38a (noting that "Betz doesn't claim that the bank misrepresented any *facts*").

is known. *See In re Exxon Mobil Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 418 (D.N.J. 2005) (plaintiffs "cannot simply rely on reassurances by management particularly when there are direct contradictions between the defendants' representations and the other materials available to plaintiffs regarding the possibility of fraud"); *Sterlin v. Biomune Sys.*, 114 F. Supp. 2d 1163, 1173 (D. Utah 1999) (on remand from Tenth Circuit, reliance on defendants' assurances in the face of an article providing information was "willful blindness").

The Seventh Circuit, for example, confronted a case, like this one, where investment advisors made rosy financial projections that did not come to fruition, and, in response to the plaintiff's inquiries, made assurances of future recoveries. *Whirlpool Fin. Corp.*, 67 F.3d at 608. On five separate occasions various executives explained that there was a "general economic recession . . . but that better times were just around the corner." *Id.* The court concluded that these assurances did not alter its conclusion that the fraud could have been discovered with the exercise of reasonable diligence. As a matter of law, the court held, the plaintiff knew or should have known everything it "needed to uncover the fraud." *Id.* at 610.

The Second Circuit similarly rejected the notion that a plaintiff could delay the running of the statute of limitations by claiming to have been ensorcelled by assurances, particularly when the suspected defrauders repeated the same act that gave rise to the cause of action

after each assurance. *See LC Capital Partners*, 318 F.3d at 155-56. The plaintiffs in that case alleged that the defendant insurance company engaged in fraud by consciously reserving insufficient funds to cover likely claims, a failure that led to repeated write-offs. *Id.* at 150-51. The plaintiffs argued that they could not have been expected to bring a securities fraud claim, because after every write-off, the defendant insisted that "[w]e . . . put many of our past problems behind us and [are] well positioned to achieve our financial goals." *Id.* at 152. The Second Circuit rejected as a matter of law the notion that these repeated assurances could throw a reasonably diligent person off the scent, particularly because the problem kept recurring and the assurances were "devoid of any specific steps taken to avoid under-reserving in the future." *Id.* at 155-56.

The Ninth Circuit staked out a position diametrically at odds with both permutations of the rule against relying on a suspected swindler's assurances when it held that a jury could find it reasonable for Betz to conclude her inquiry merely because "the defendants assured her they would take care of any problems and asked her not to file suit." App. 22a. This is not just a matter of different facts yielding different results. Rather, the Ninth Circuit has developed a different legal definition of "reasonable diligence." If Betz had filed this case in the Third or the Eighth Circuit, no assurance by the suspected defrauders would have prevented the statute of limitations from accruing. Had she

filed in the Second or Seventh Circuits which follows the less categorical standard, the statements the Ninth Circuit invoked still would not have been enough to override the facts she knew.

Any of these other circuits would have concluded that if Betz truly believed that she had been promised that her principal would not be touched, both the Letter she signed and the 39 account statements definitively proved that promise was false, as a matter of law. Under the rule followed everywhere else in the country, nothing any of the Petitioners said could overcome that definitive proof. One of the statements the Ninth Circuit invoked—Vile's prediction "that the market would recover," App. 5a—was not an assurance at all; it was confirmation that her account balance would depend upon market performance—confirmation, in other words, that the promise was false. The same goes for the statement that the there was a "serious problem" with her account; no reasonable investor would take that confession as a signal to stop asking questions. Likewise, the vague assurance that Trainer Wortham would "take care of the account," and a request "not [to] take any legal action," *id.*, could not override the unmistakable evidence that any supposed promise that the principal would never be touched was just plain false. The fact is Betz met with Petitioners four times in the year between May 2000 and April 1, 2001. Her account balance declined after each meeting. None of these assurances would have thrown off

the investigation of a reasonable investor. And, in fact, the assurances did not throw Betz off: She kept coming back expressing "concern" about her ever-declining balance. She even hired an attorney.

As Chief Judge Kozinski has pointed out, this alternative holding, alone, obliterates the statute of limitations. "One wonders what a securities defendant could say to an unhappy investor that would *not*, under the panel's loosey-goosey standard, toll the statute of limitations forever, no matter how many storm warnings the investor has received." App. 38a. The only message to be drawn from the Ninth Circuit's holding is that the statute of limitations does not run until a plaintiff has gotten her hands on everything she needs to prove her case, has exhausted all avenues of relief, and has come to conclude that there will be no settlement. Every circuit to address this question has disagreed.

* * *

Before the Ninth Circuit articulated its standard in this case, the differences in the articulated standards among the other circuits were persistent and intractable. That split alone was worthy of this Court's review. But the split cries out for review especially now. On each of these two holdings the Ninth Circuit stands alone, and dramatically so, against the tide of all the other circuits. Chief Judge Kozinski was not exaggerating when he groaned, "Here we are, out in left field again." App. 28a. The Ninth

Circuit's extreme position, while of recent vintage, is explicit and clear. Short of en banc review—which the Ninth Circuit declined despite an eloquent plea from its Chief Judge and two other respected jurists—there is no way the Ninth Circuit can retreat from this position. And the prospect that all the other circuits will decide to abandon their position in favor of the Ninth Circuit's view is about as likely as the chance that a firm could confidently promise to spin straw into gold. Only this Court can restore the uniformity Congress intended by passing 28 U.S.C. § 1658(b).

II. THIS CASE PRESENTS ISSUES OF PROFOUND NATIONAL IMPORTANCE.

As this Court has held, plaintiffs and businesses alike must have a uniform statute of limitations for federal securities fraud claims. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 357 (1991). Congress confirmed the importance of uniformity when it enacted 28 U.S.C. § 1658(b), setting a new nationwide two-year statute of limitations.

The uniformity Congress demanded is illusory when different circuits count two years from different dates, with one circuit counting two years from, well, never. The result is "uncertainty for both plaintiffs and defendants, as a plaintiff alleging a federal claim in State A would find herself barred by the [applicable] statute of limitations while a plaintiff raising precisely the same claim in State B would be permitted to proceed." *Jones v. R.R. Donnelley &*

Sons Co., 541 U.S. 369, 377 (2004). Under the status quo, businesses have lost the ability to manage litigation risks. *See Gilbertson*, 501 U.S. at 357. Plaintiffs have lost the predictability they need to conform their conduct to the rules. *Id.* The consolation prize for plaintiffs is an open invitation to wait and see whether their investments recover and then shop around for the forum that will still entertain their claims. *Id.*; *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987). Particular plaintiffs, like Betz, might prefer the consolation prize, on balance, but these are not the sorts of benefits that Congress intended to bestow on them.

In this regard, the Ninth Circuit's rule is especially neuralgic. As Chief Judge Kozinski observed, "[i]f a securities defendant in a simple case like this cannot use the statute of limitations as a shield against the costs and hazards of trial, then no defendant can, and the statute of limitations Congress passed for 10b-5 cases is pretty much a dead letter in this circuit." App. 28a-29a.

In the nine states of the Ninth Circuit, a plaintiff need not so much as pick up the phone for a friendly inquiry until someone presents her with evidence of bad intent on a silver platter—the sort of evidence that is typically unavailable until discovery. In those states, a plaintiff who sees an investment plummet has every incentive to do exactly what Chief Judge Posner warned of: to write the complaint and tuck it away in a desk drawer—with her life insurance policy and

fading prom pictures—to be shredded if the investment rebounds, or dusted off and filed in court if it does not. *See Fujisawa*, 115 F.3d at 1334; App. 33a-34a. In those states, the plaintiff is free to let the complaint collect dust, as long as some defendant offers the vaguest prospect of an amicable resolution, or merely asks her not to sue. In so ruling, the Ninth Circuit seems to have forgotten that the securities laws are designed "to protect the innocent investor, not the investor who loses his innocence and then waits to see how his investment turns out before he decides to" sue. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1413 (9th Cir. 1987). Instead, the Ninth Circuit has declared itself a haven for hucksters and procrastinators, and has all but converted brokers and investment advisors into unwilling guarantors of market performance.

To make matters worse, under the Ninth Circuit's summary judgment standard, businesses will have to endure costly trials—or settle claims that are plainly untimely and meritless—even where the facts are undisputed. Any such standard defies this Court's recent admonition that courts should not to incur the dear societal cost of allowing anemic securities fraud claims to fester in the courts when they should be dismissed. *See Stoneridge Invest. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 772 (2008) ("[A]llow[ing] plaintiffs with weak claims to extort settlements from innocent companies" could raise the cost of doing business, and "shift securities offerings away from domestic capital markets."); *Tellabs, Inc. v.*

Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007) (securities fraud actions "can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (interpreting the Securities Litigation Uniform Standards Act of 1998 to bar "wasteful, duplicative" securities class actions in state courts); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (concern with "permit[ing] a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" (quotation omitted)). In the largest circuit in this country, securities cases that would elsewhere be rejected at the inception will stand in queue lumbering excruciatingly to trial. Honest businesses will pay such claims for no other reason than that they cannot justify the resources and distraction of litigation.

That cannot be what Congress intended. But if that is to be the law, the shift should come from this Court and should apply to all.

CONCLUSION

For the foregoing reasons, this Court should

grant a writ of certiorari.

Respectfully submitted,

Sara B. Brody
Warrington S. Parker, III
Alexander M.R. Lyon
Colin E. Kelley
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Counsel for Petitioners

May 27, 2008

APPENDICES

APPENDIX A

APPENDIX A

[Filed February 26, 2008]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEIDE BETZ,

Plaintiff-Appellant,

v.

TRAINER WORTHAM & COMPANY, INC.; DAVID P. COMO; FIRST REPUBLIC BANK, a Nevada corporation; ROBERT VILE,

Defendants-Appellees.

No. 05-15704

519 F.3d 863
2008 U.S. App. LEXIS 4081

February 12, 2007, Argued and Submitted,
San Francisco, California
February 26, 2008, Amended

COUNSEL: Joseph M. Alioto, San Francisco, California, Theodore F. Schwartz, St. Louis, Missouri, and Myron Moskovitz, Berkeley, California, for the plaintiff-appellant.

Sara B. Brody and Alexander M.R. Lyon, Heller Ehrman, LLP, San Francisco, California, for the defendants-appellees.

JUDGES: Before: John T. Noonan, Jr., Ronald M. Gould, and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge Gould.

OPINION BY: Ronald M. Gould

OPINION

GOULD, Circuit Judge:

We must decide whether Heide Betz's federal securities fraud claim is barred by the statute of limitations.[1] We hold that there is a genuine issue of material fact whether Betz's claim is time barred, and we reverse the district court's summary judgment for the defendants.

I

On an appeal of summary judgment we, like the district court, view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Viewed in the light most favorable to Betz, the facts are as follows:

---

[1] In a separately-filed memorandum disposition, we resolve Betz's appeal of the district court's disposition of her state law claims.

In 1999, Betz, a retired art dealer, sold her house for $2.2 million. Betz planned to buy a co-op and invest the proceeds of the sale of her house to provide interest income. An employee of First Republic Bank named Carmen Castro introduced Betz to David Como, an employee of Trainer Wortham, an investment subsidiary of First Republic Bank. Como and Castro recommended that Betz invest the proceeds from the sale of her house with Trainer Wortham. Como and Castro assured Betz that, if she invested her $2.2 million with Trainer Wortham, she could withdraw $15,000 per month from her portfolio, for living expenses, without touching the $2.2 million in principal.

According to Betz, on June 7, 1999, Betz entered into an oral agreement with Como, who was acting on behalf of Trainer Wortham, giving the defendants control over her $2.2 million. Betz and Como agreed that Como would invest Betz's money "in such a fashion that [Betz] would receive $15,000 a month from the profit of the investment and that [the defendants] would not touch the principal." The same day, Betz and Como, who was again acting on Trainer Wortham's behalf, entered into a written "Letter of Understanding for Portfolio Management and Administration Services" and an "Investment Management Agreement." These documents explicitly stated that Betz's account was subject to market risk and that "no person has represented to [Betz] that any particular result can or will be achieved." However, these documents also contained no "merger" or "integration" clauses and made no reference to the alleged oral

agreement regarding Betz's $15,000 in monthly maintenance income.

After Betz opened her account with Trainer Wortham, she received account statements at least once per month. In February 2000, Betz received a statement reflecting an account value below her initial investment of $2.2 million. Between February 2000 and July 2001, Betz received twenty-nine more account statements, each reflecting an account balance of less than $2.2 million. In March 2001, Betz's account balance had dropped to $848,000. Around that time, Betz spoke with Robert Vile, a Trainer Wortham employee, to express concern about the declining value of her account. Vile told Betz that the declining balance was attributable to her monthly $15,000 withdrawals; he assured her, however, that the shortfall was temporary, that the market would recover, and that in a year or less her account balance would be back to $2.2 million. When subsequent account statements showed the balance of Betz's account continuing to fall, she met with Castro, who told her that there was a "serious problem" with the way Betz's portfolio had been managed and that the president of Trainer Wortham, Charles Moore, would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." In May 2002, after Betz had met with Moore in person, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." However, in June 2002, Castro

advised Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account.

Betz filed her complaint in this case on July 11, 2003, alleging that Como, Vile, Trainer Wortham, and First Republic Bank (collectively, "Trainer Wortham" or "defendants") had committed securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. The defendants moved for summary judgment on the ground that Betz's federal securities fraud claim was barred by the statute of limitations. Section 804(a) of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 801 (codified at 28 U.S.C. § 1658(b)), provides that a suit for securities fraud under § 10(b) of the Securities Exchange Act must be filed "not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." The district court held that, because Betz had inquiry notice of the defendants' violations of § 10(b) before July 11, 2001, Betz's claims were time barred, and on this ground the district court granted summary judgment for the defendants.

II

We review de novo the district court's grant of summary judgment. *Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 877 n.11 (9th Cir. 2006). Federal Rule of Civil Procedure 56(c) entitles a party to summary judgment "if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As we noted above, in deciding a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

III

The defendants contend that Betz's suit is time barred because she had both actual and inquiry notice of the facts giving rise to her claim. Betz contends that she had neither.

We first address actual notice. Betz's suit is timely only if she filed it "not later than . . . 2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). Viewing the facts in the light most favorable to Betz, there is a genuine issue of fact about whether Betz actually discovered that she had a claim against the defendants for securities fraud more than two years before she filed her suit on July 11, 2003. For Betz to have a claim under § 10(b), the defendants must have had, among other things, scienter, which is the "mental state embracing intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976); *see also Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1047 (9th Cir. 2006) (listing the elements of a federal securities fraud claim), *petition for cert. filed sub nom. Avis Budget Group, Inc. v. Cal. State Teachers Ret. Sys.*, No. 06- 560

(U.S. filed Oct. 19, 2006). In *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 974 (9th Cir. 1999), we held that to adequately plead scienter, a § 10(b) plaintiff "must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." We went on to describe this heightened pleading standard as follows:

> Our holding rests, in part, on our conclusion that Congress intended to elevate the pleading requirement above the Second Circuit standard requiring plaintiffs merely to provide facts showing simple recklessness or a motive to commit fraud and opportunity to do so. We hold that although facts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness. In order to show a strong inference of deliberate recklessness, plaintiffs must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity. Accordingly, we hold that particular facts giving rise to a strong inference of deliberate recklessness, at a minimum, is required to satisfy the heightened pleading standard under the PSLRA.

Id.

We cannot say that, as a matter of law, Betz, before July 11, 2001, actually discovered facts suggesting that the defendants consciously or deliberately and recklessly deceived her. Under the version of facts presented by Betz, a reasonable factfinder could conclude that Betz did not discover that the defendants intentionally misled her into believing that she could withdraw $15,000 per month without depleting her principal until June 2002, when Moore told her that Trainer Wortham was "not going to do anything" to fix her account.

If the statute of limitations began running only upon Betz's actual discovery of the facts giving rise to her securities fraud claim, this would end our inquiry. However, the defendants contend that, even if Betz did not actually discover the facts underlying her claim before July 11, 2001, Betz was on "inquiry notice" of her claim before that date, and that her claim therefore is still barred by the statute of limitations. We address that argument in the next section.

IV

A

We have held that the statute of limitations for a federal securities fraud claim begins to run when the plaintiff has either actual or inquiry notice that the defendants have made a fraudulent misrepresentation. *See, e.g., Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir.

1987). In more recent cases, however, it has been suggested that under the United States Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), only actual notice of the facts forming the alleged fraud, and not inquiry notice of those facts, triggers the running of the statute of limitations for a § 10(b) claim.[2] *See Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999); *see also Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005). The uncertainty introduced by our opinion in *Berry* led us to suggest in *Livid Holdings* that, notwithstanding our unequivocal pre-*Lampf* case law, we had "considered, but not made a final determination on whether actual or inquiry notice of the alleged fraud triggers the running of Rule 10b-5's statute of limitations." *Livid Holdings*, 416 F.3d at 951.

In *Lampf*, the Supreme Court resolved a split among the circuits regarding the statute of limitations applicable to a § 10(b) claim. *See Lampf*, 501 U.S. at 354. Some circuits had borrowed state statutes of limitations, while others had established a unique federal limitations period. *See id.* at 354 n.1. The Supreme Court in *Lampf* held

---

[2] Though *Gray* was decided after the Supreme Court handed down *Lampf*, in *Gray* we applied pre-*Lampf* statute of limitations principles pursuant to 15 U.S.C. § 78aa-1(a), which provides that pre-*Lampf* limitations periods apply to suits filed before *Lampf* was decided. *See Gray*, 82 F.3d at 879 n.1, 880-81.

that the statute of limitations provided in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e), was the appropriate standard. *See Lampf*, 501 U.S. at 364 n.9. Section 9(e) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."[3] No one disputes that "discovery" can occur when a plaintiff actually discovers facts giving rise to his or her claim. However, *Lampf* left it to the lower courts to decide whether "discovery" occurs *only* upon actual notice or whether "discovery" can occur on some form of inquiry notice.

We hold that either actual or inquiry notice can start the running of the statute of limitations on a federal securities fraud claim. While it is unquestioned that actual notice can mark the beginning of the limitations period, two things happened in the aftermath of *Lampf* that convince us that an inquiry notice standard should also apply to federal securities fraud claims. First, the courts of appeal in our sister circuits, along with the district courts in our own circuit, have uniformly embraced inquiry notice. In fact, "every circuit to have addressed the issue since *Lampf* has

---

[3] The one year/three year limitations period set forth in § 9(e) still applies to securities fraud suits filed before the enactment date of Sarbanes-Oxley, July 30, 2002. *See* Sarbanes-Oxley Act § 804(b).

held that inquiry notice is the appropriate standard." *Berry*, 175 F.3d at 704; *see Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1267-68 (11th Cir. 2006); *Shah v. Meeker*, 435 F.3d 244, 249 (2d Cir. 2006); *Glaser v. Enzo Biochem, Inc.*, 126 Fed. App'x 593, 597 (4th Cir. 2005) (citing *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993)); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002); *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Ritchey v. Horner*, 244 F.3d 635, 638-39 (8th Cir. 2001); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1200 (10th Cir. 1998); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 367 (7th Cir. 1997); *Topalian v. Ehrman*, 954 F.2d 1125, 1134-35 (5th Cir. 1992). Likewise, the district courts in our circuit regularly apply an inquiry notice standard to § 10(b) claims. *See, e.g., In re Micron Techs., Inc. Sec. Litig.*, No. CV-06-085-S-BLW, 2007 U.S. Dist. LEXIS 12446, 2007 WL 576468, at *4 (D. Idaho Feb. 21, 2007); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1026 (S.D. Cal. 2005); *In re Infonet Servs. Corp. Secs. Litig.*, 310 F. Supp. 2d 1106, 1113 (C.D. Cal. 2003); *Getty v. Harmon*, 53 F. Supp. 2d 1053, 1055 (W.D. Wash. 1999); *Freedman v. Louisiana-Pacific Corp.*, 922 F. Supp. 377, 395 (D. Or. 1996); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1099 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996); *Aizuss v. Commonwealth Equity Trust*, 847 F. Supp. 1482, 1486 (E.D. Cal. 1993). While not binding on us, the reasoned opinions of ten of our sister circuits and the

widespread practices of the district courts in our own circuit weigh heavily in favor of holding that inquiry notice can trigger the running of the statute of limitations on a securities fraud claim. The uniformity of the precedent in this direction sends a signal message that inquiry notice, and not merely actual notice, can cause the statute of limitations for securities fraud to begin to run.

The second post-*Lampf* event that convinces us that an inquiry notice standard is appropriate is an act of Congress. In the Sarbanes-Oxley Act of 2002, Congress extended the limitations period for § 10(b) suits from "one year after the discovery of the facts constituting the violation," 15 U.S.C. § 78i(e), to "2 years after the discovery of the facts constituting the violation" for actions commenced after July 30, 2002, 28 U.S.C. § 1658(b); Sarbanes-Oxley Act, § 804(b). In its new enactment, Congress opted for language identical to the language previously in effect in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e). The Supreme Court has instructed that we should assume that Congress is aware of the prevailing case law and legislates in its light. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law. . . ."); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982) (interpreting the Commodity Exchange Act in light of pre-enactment case law). In 2002, the prevailing case law in the lower federal courts interpreted the language of § 9(e) to mean that the limitations period could be

commenced upon some form of inquiry notice. By choosing language nearly identical to the language of § 9(e), Congress implicitly approved of that case law. *See Cannon*, 441 U.S. at 696-99 (interpreting Title IX to provide a private cause of action because Congress used language identical to that found in Title VI, which had already been interpreted by the courts to provide a private cause of action); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (holding that the silence of the Class Action Fairness Act regarding the burden of proving removal jurisdiction indicated Congressional intent to leave intact the common law rule placing the burden on the defendant); *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002) (noting that "[i]n construing statutes, we presume Congress legislated with awareness of relevant judicial decisions" and holding that Congress's failure to explicitly include "tribal governments" within the Federal Juvenile Delinquency Act's definition of "State," when amending other parts of the Act, "may be interpreted as an endorsement of the judicial decisions excluding tribes from the definition of 'State'").

We recognize that the pragmatic effects of applying an inquiry notice standard to § 10(b) are both positive and negative for individual litigants. As was suggested in *Berry*, a case decided under the old one-year limitations period, such a standard may compel plaintiffs to file a suit based on "skimpy facts." *See Berry*, 175 F.3d at 704 n.6 (quoting Charles Benjamin Nutley, Comment, *Triggering One-Year Limitations on Section 10(b)*

and Rule 10b-5 Actions: Actual or Inquiry Discovery?, 30 San Diego L. Rev. 917, 948 (1993)). However, Congress's extension of the relevant limitations period from one to two years alleviates this concern and allows us to conclude that an inquiry notice standard strikes an acceptable balance between the interest in requiring plaintiffs promptly to file suit and the competing interest in avoiding the encouragement of baseless or premature suits by requiring plaintiffs to sue before they can discover the facts underlying their claims. *See New England Health Care Employees Pension Fund*, 336 F.3d at 501; *Young*, 305 F.3d at 9; *Sterlin*, 154 F.3d at 1202.

B

We have previously stated that, if we were to adopt an inquiry notice standard for § 10(b) suits, we would apply a standard similar to that applied by the Tenth Circuit. *See Livid Holdings*, 416 F.3d at 951; *Berry*, 175 F.3d at 704. Today we adopt the inquiry-plus-reasonable-diligence test used by the Tenth Circuit. *See, e.g.*, *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201 (10th Cir. 1998) (holding that inquiry notice "triggers an investor's duty to exercise reasonable diligence and that the . . . statute of limitations period begins to run once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud."). Under that standard, to determine when the statute of limitations begins running, we first determine when the plaintiff had inquiry notice of the facts giving rise to his or her securities fraud claim. A

plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further. Like our sister circuits, we caution that inquiry notice should not be construed so broadly that the particular plaintiff cannot bring his or her suit within the limitations period. The facts constituting inquiry notice "must be sufficiently probative of fraud—sufficiently advanced beyond the stage of a mere suspicion . . . to incite the victim to investigate." *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997), *quoted in Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005). Once a plaintiff has inquiry notice, we ask when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. The answer to that second question tells us when the statute of limitations began to run.

The question of whether inquiry notice exists is objective and contemplates a "reasonable investor" or "reasonable person" standard. *See, e.g.*, *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 193 (2d Cir. 2003) (citations and internal quotation marks omitted) (holding that inquiry notice of securities fraud is triggered when the plaintiff receives "sufficient storm warnings to alert a reasonable person to the probability that there were either misleading statements or significant omissions involved"); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (holding that inquiry notice exists where "a reasonable investor of ordinary intelligence would have discovered the [suspicious] information and recognized it" as

suspicious); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997) (inquiry notice is present "when the victim is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge of the defendant's misrepresentations."). The existence of inquiry notice is only the first prong of the two-part notice-plus-reasonable-diligence test that we are today adopting, and the second stage of that inquiry, the question of whether the plaintiff exercised reasonable diligence in investigating the facts underlying the alleged fraud, while remaining essentially objective in character, necessarily entails an assessment of the plaintiff's particular circumstances from the perspective of a reasonable investor. In this second stage of the inquiry, one of the factors to be considered is whether the plaintiff was given any assurances by a defendant after beginning to investigate the suspicious circumstances that would have delayed discovery of the fraud by a reasonable person in the plaintiff's position. For example, in a situation much like the instant case, we have held that, when an investor met with representatives of a defendant company about possible fraud and was assured that there "had been no improprieties," whether the statute of limitations began running was a question for the trier of fact. *See SEC v. Seaboard Corp.*, 677 F.2d 1301, 1310 (1982). In that case, we concluded that "the question of what a reasonable investor would have done [under those circumstances] is not so certain as to allow a determination as a matter of law." *Id.*

Moreover, under the notice-plus-reasonable-diligence standard we apply to securities fraud claims, the defendant bears a considerable burden in demonstrating, at the summary judgment stage, that the plaintiff's claim is time barred. *See Seaboard Corp.*, 677 F.2d at 1309-10 (noting that "the question of notice of fraud is for the trier of fact" and that "the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice"). "Summary judgment is appropriate only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Gray*, 82 F.3d at 881 (internal quotations omitted); *see also Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The question of what a reasonably prudent investor should have known is particularly suited to a jury determination.").[4] Our hesitation to approve

---

[4] We have in some cases resolved by summary judgment the question of whether a federal securities plaintiff had sufficient notice of alleged fraud to trigger the statute of limitations. For example, in *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988) (per curiam), a case predating our adoption of the inquiry-plus-reasonable-diligence standard for inquiry notice in federal securities fraud cases, we concluded that summary judgment on the issue of notice was proper where the plaintiff took an active role in the management of his investments and made suggestions to his broker about his portfolio. *See id.* at 1370. By contrast, Betz merely expressed generalized concerns about her declining

(footnote continued...)

(continued from previous page)
account balance, in response to which, if we credit Betz's testimony, she received specific assurances from the president of Trainer Wortham that her account problems would be resolved and that she should forego suit. No such evidence of assurances from the highest levels of the defendant securities firm was present in *Davis*. We also affirmed a summary judgment recognizing inquiry notice in the case of *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987). *Volk* involved several investors who purchased limited partnership interests in coal mining operations marketed as tax shelters and who were subsequently informed by the general partner both through a letter and an annual report that the partnership properties did not contain minable coal reserves as warranted and that the investors might therefore not be legally entitled to the tax deductions they had been taking. *Id.* at 1409-10. The investors argued that the statute of limitations on their securities fraud claim did not begin running until the IRS disallowed their deductions and they first suffered out-of-pocket losses, but the court held as a matter of law that the statute began to run when they received the letter and annual report from the general partner putting them on inquiry notice of the problem with the coal reserves. *See id.* at 1411. However, *Volk* differs from the case before us in that the warnings that the *Volk* investors received indicated a much more permanent and fundamental type of problem with the underlying investment than the declining account balances experienced by Betz, which, at least in theory, could have reversed themselves over time. In addition, while some of the investors in *Volk* also received reassurances from the defendant investment company when they expressed concerns about the general partner's communications, these assurances took the general form of admonitions "not to worry" about the letter, *id.*, whereas in Betz's case she claims that she was specifically promised that the president of Trainer Wortham would

(footnote continued...)

summary judgment in securities fraud cases is especially pronounced where the plaintiff alleges that the defendants' reassurances convinced the plaintiff to postpone his or her legal action. *See Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984).

We now turn to the facts of this case. Under our inquiry notice standard outlined above, and keeping in mind that this case is before us on summary judgment, we ask whether there is a genuine dispute about whether there existed facts sufficiently probative of fraud to cause a reasonable investor to conduct a further investigation. Viewing the facts in the light most favorable to Betz a rational jury could conclude that a reasonable investor in Betz's shoes would not have initiated further inquiry before July 11, 2001.

The defendants contend that the account statements Betz received would have spurred a reasonable investor to inquire further whether Trainer Wortham had defrauded her. However, the account statements indicated, at most, that the defendants had failed to fulfill their oral promise that Betz could withdraw $15,000 per month from her account without depleting the principal. As a matter of law, we cannot say that a declining account balance, in and of itself, would have

---

(continued from previous page)
remedy the problems with her account because it was "the right thing to do" and that in the meantime she should refrain from taking any legal action against the company.

spurred a reasonable investor to further inquire whether he or she had been *defrauded*. *See Gray*, 82 F.3d at 881 ("It is well settled that poor financial performance, standing alone, does not necessarily suggest securities fraud . . . , but could also be explained by poor management, general market conditions, or other events unrelated to fraud, creating a jury question on inquiry notice."); *see also Livid Holdings*, 416 F.3d at 951 ("This court has held that financial problems alone are generally insufficient to suggest fraud.").

Likewise, Castro's statement that there was a "serious problem" with Betz's portfolio did nothing more than indicate to Betz that the defendants had not been able to make good on their promise of at least $15,000 per month in interest income. Because such a statement provided no evidence that the defendants had intentionally or deliberately and recklessly misled Betz as *Silicon Graphics* requires to state a claim for securities fraud, *see Silicon Graphics*, 183 F.3d at 974, a rational jury could conclude that, upon hearing such a statement, a reasonable investor would not have initiated further inquiry into the existence of fraud. *See Fujisawa Pharm.*, 115 F.3d at 1335 (noting that "[t]he facts constituting [inquiry] notice must be sufficiently probative of *fraud*" (emphasis added)).

Moreover, even if Betz was on inquiry notice of fraud, under the second prong of our inquiry notice standard, we cannot say that, as a matter of law, Betz, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged

fraud. In this case, Betz questioned the defendants about her account and the defendants assured her that they would take care of any problems and asked her not to file suit. In *Seabord Corp.*, the defendant's giving of assurances in response to a codefendant's inquiries, which had the effect of lulling the codefendant and delaying the onset of legal action, was held to preclude summary judgment and create an issue for the trier of fact as to when the statute of limitations began to run. *See Seaboard Corp.*, 677 F.2d at 1310. Trainer & Wortham's assurances to Betz in this case, which were given as recently as May of 2002, similarly give rise to a fact issue which makes summary judgment inappropriate.

We do not suggest, however, that there is a *per se* rule that in all cases involving assurances from a brokerage firm to an investor, the issue of inquiry notice must go to a jury. Rather, we conclude that here, in the total circumstances, and from the point of view of a reasonable investor, there was a genuine issue whether Betz should be held to have had notice of securities fraud.

V

In summary, we hold that, once there exists sufficient indicia of fraud to cause a reasonable investor to inquire into whether he or she has been defrauded, the statute of limitations on a claim under § 10(b) of the Securities Exchange Act begins running when the investor, in the exercise of reasonable diligence, should have discovered the facts giving rise to his or her claim. In this case, we cannot say that, as a matter of law, a reasonable

investor in Betz's position should have discovered the facts giving rise to her claim before July 11, 2001, especially in light of the express assurances made by Defendants that they would remedy the problems with the account, which may have lulled a reasonable investor into inaction. Thus, a jury must determine whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right. We reverse the district court's judgment in favor of the defendants and remand this case for further proceedings consistent with our opinion.

REVERSED AND REMANDED.

APPENDIX B

APPENDIX B

[Filed February 26, 2008]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEIDE BETZ, *Plaintiff-Appellant,* v. TRAINER WORTHAM & COMPANY, INC.; DAVID P. COMO; FIRST REPUBLIC BANK, a Nevada corporation; ROBERT VILE, *Defendants-Appellees.*	No. 05-15704 D.C. No. CV-03-03231-SI ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
February 12, 2007—San Francisco, California

Filed October 4, 2007
Amended February 26, 2008

Before: John T. Noonan, Jr., Ronald M. Gould, and Johnnie B. Rawlinson, Circuit Judges

Order:
Dissent to Order by Chief Judge Kozinski
Opinion by Judge Gould

ORDER AMENDING OPINION AND DENYING REHEARING EN BANC

The opinion filed on October 4, 2007 is amended as follows.

The last sentence of the second paragraph in Part I, which reads:

> Betz told Como and Castro that she knew nothing about stocks and bonds and that she only would understand the "bottom line," or total balance, of her account.

shall be deleted in its entirety.

In addition, the second and third sentences of footnote 4, which currently read:

> In *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988), for example, we concluded that summary judgment on the issue of notice was proper because the plaintiff was a well-educated and experienced investor who made suggestions to his broker about his portfolio and who described himself as a "sophisticated investor." *Id.* at 1370. By contrast, Betz had informed the defendants that she had no experience with stocks or bonds and would only understand the bottom line of her account statements. and thereafter, if we credit Betz's

> testimony, received specific assurances from the president of Trainer Wortham that her account problems would be resolved and that she should forego suit.

shall be deleted and replaced with the following text:

> For example, in *Davis v. Birr, Wilson & Co.*, 839 F.2d 1369 (9th Cir. 1988) (per curiam), a case predating our adoption of the inquiry-plus-reasonable-diligence standard for inquiry notice in federal securities fraud cases, we concluded that summary judgment on the issue of notice was proper where the plaintiff took an active role in the management of his investments and made suggestions to his broker about his portfolio. *See id.* at 1370. By contrast, Betz merely expressed generalized concerns about her declining account balance, in response to which, if we credit Betz's testimony, she received specific assurances from the president of Trainer Wortham that her account problems would be resolved and that she should forego suit. No such evidence of assurances from the highest levels of the defendant securities firm was present in *Davis*.

Having made the foregoing amendments to the opinion, all judges on the panel have voted to deny Defendant/Appellee's Petition for Panel Rehearing, and so that petition is DENIED.

The full court has been advised of Defendant/Appellee's Petition for Rehearing En Banc, and a

judge of this court requested a vote on whether this case should be reheard en banc; however, a majority of the active judges did not vote in favor of en banc consideration. Fed. R. App. P. 35. Accordingly, the Petition for Rehearing En Banc is also DENIED. No further petitions for rehearing or rehearing en banc shall be accepted.

DISSENT BY: KOZINSKI

DISSENT

KOZINSKI, Chief Judge, with whom Judges O'SCANNLAIN and BEA join, dissenting from the order denying the petition for rehearing en banc:

Here we are, out in left field again. The panel's unique interpretation of the statute of limitations for securities fraud puts us at odds with ten other circuits.

This isn't one of those byzantine securities cases involving risk-indexed convertible debentures or rupee-denominated strip bonds; there was no Gibbon-length, fine-print prospectus artfully concealing liabilities. Betz claims, rather, that defendant induced her to invest $2.2 million by promising a princely return with zero risk. Slip op. at 1656-1657. This purported oral promise—which flatly contradicts Betz's written contract and common sense—is her sole theory of fraud. If a securities defendant in a simple case like this cannot use the statute of limitations as a shield against the costs and hazards of trial, then no defendant can, and the statute of limitations

Congress passed for 10b-5 cases is pretty much a dead letter in this circuit.

Betz found out that her investment wasn't risk-free after all by February 2000, when she received an account statement from the bank showing a balance $170,000 lower than her initial investment. How could a risk-free investment result in such a massive loss of principal? Doesn't risk-free mean that the principal will never diminish? Betz admits that she read the statement and grasped the "bottom line." *Id.* Thereafter, her principal steadily dwindled; she received 29 more account statements charting its inexorable decline. One would think that a sane, rational, *reasonable* investor who discovered that her principal was fast disappearing after she had been promised that it would not be "touch[ed]," *id.*, would suspect that someone lied to her. Yet Betz waited three and a half years to bring suit—nearly double the time Congress allowed. 28 U.S.C. § 1658(b)(1).

The panel keeps Betz's lawsuit alive by invoking the mantra of material issues of fact that only a jury can decide. Slip op. at 1669. But there's no factual dispute here; everyone agrees on what Betz knew and when she knew it. The only question is whether those facts were enough to put a reasonable investor on inquiry notice. See p. 1647 *infra*. *Ten* other circuits have held that "inquiry notice . . . . may be determined as a matter of law where, as here, the underlying facts are admitted or undisputed." *Maggio v. Gerard Freezer & Ice*

Co., 824 F.2d 123, 128 (1st Cir. 1987).[1] Paddling stubbornly against the current, the panel insists that only a jury can decide.[2]

But there's more, so much more. According to the same ten circuits, the statute of limitations starts to run when plaintiff is on "inquiry notice,"

---

[1] Four other circuits make the point in equally direct terms. *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 250 n.13 (3d Cir. 2001); *Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 352 n.3 (2d Cir. 1993); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993). Another five circuits, though not stating the rule in so many words, have acted on it by holding, as a matter of law, that the statute has run. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005) (dismissing complaint on statute-of-limitations grounds); *Theoharous v. Fong*, 256 F.3d 1219 (11th Cir. 2001) (same); *Treganza v. Great Am. Commc'ns Co.*, 12 F.3d 717 (7th Cir. 1993) (granting summary judgment on statute-of-limitations grounds); *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir. 1992) (same); *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1441-42 (10th Cir.), *amended on denial of reh'g*, 947 F.2d 897 (10th Cir. 1991), vacated sub nom. *Dennler v. Trippet*, 503 U.S. 978, 112 S. Ct. 1658, 118 L. Ed. 2d 382 (1992) (same).

[2] The panel protests that it hasn't adopted a "*per se* rule that in all cases . . . the issue of inquiry notice must go to a jury," slip op. at 1670, but that's *exactly* the rule the panel adopts. Inquiry notice depends on what a reasonable investor would have done; the panel holds that only a jury can decide what's reasonable. There is nothing to distinguish this case from any other; summary judgment simply doesn't exist in the world the panel has created.

that is, when a reasonable investor in plaintiff's position would suspect he had been defrauded. *See, e.g., Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201-02 & n.19 (10th Cir. 1998). The panel pretends to adopt this standard, but rejects it in fact. Since Betz's theory of fraud is that she was told her money would not be put at risk, she had at least inquiry notice that someone had lied to her when she saw her principal melt away like a popsicle in July. The appendix tells the tale in Betz's own hand: It is her account statement from January 2001, showing a balance that was by then nearly $1 million below her initial investment. Scribbled in the margin are Betz's notes describing a "panic[ked]" phone call to her account manager complaining about her losses. Though the opinion doesn't acknowledge this particular inquiry, it does mention a similar call Betz placed to the same manager two months later. Slip op. at 1657. Betz made these inquiries (and several others like them) more than two years before she sued in July 2003; so, to save her from the statute of limitations, the panel must adopt a bizarre definition of inquiry notice: Notice that *actually* causes the investor to make inquiries is nevertheless insufficient to put a reasonable investor on notice to make inquiries. No other court in the known universe has adopted such an oxymoronic rule.

Five other circuits have dealt with cases where investors claimed they were hoodwinked by promises that their dollars would multiply like bunnies with absolutely no risk. All five held that the statute of limitations was triggered as soon as the investors found out they lost money, if not

before. The First and Third Circuits held that sharply declining balances put investors on notice that the promised lack of risk was a lie. *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 254 (3d Cir. 2001) (Nygaard, J.); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 129 F.3d 222, 224 (1st Cir. 1997) (Boudin, J.). Had Betz lived in Boston or Philadelphia, she would have been on inquiry notice by January 2001, at the very latest: By then, her account had lost about half its value, and the bank had confirmed that those losses were real. The Second, Fourth and Fifth Circuits have held that investors in Betz's position are on inquiry notice even earlier—as soon as they are handed documents warning them that their investments would be riskier than promised. *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 352 (2d Cir. 1993) (Winter, J.); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 163 (4th Cir. 1993) (Wilkinson, J.); *Topalian v. Ehrman*, 954 F.2d 1125, 1134 (5th Cir. 1992) (Garza, J.). Had Betz lived in New York, Baltimore or Houston, she would have been on inquiry notice as soon as she opened her account and received the bank's "Letter of Understanding," which told her, in contradiction to the alleged oral promise, that her investment was "subject to investment risk and a possible loss of principal."

In reaching the contrary conclusion, the panel holds that Betz couldn't be on inquiry notice until she had solid proof of every single element of her 10b-5 claim, including scienter. Slip op. at 1669. And, without more proof of scienter, the panel opines, a reasonable investor in Betz's position

would have believed that the bank really did mean to put the money into 30-day T-bills, but somehow got confused and bought volatile stocks instead. According to the panel, it wouldn't have crossed a reasonable investor's mind that the bank lied when it promised a risk-free investment until June 2002, when Betz had lost about four-fifths of her principal and the bank refused to make good her losses. See slip op. at 1657.[3] The argument does serious violence to "reasonable investor" and "inquiry notice."

The panel cites no authority supporting its curious notion that an investor isn't on inquiry notice until he has concrete proof of every element of his claim, including scienter. There *is* no such authority; ten circuits disagree. Tellingly, the only on-point case the panel cites,[4] *Fujisawa*

---

[3] The panel doesn't explain what's so special about June 2002, except that it's less than two years before Betz brought suit. Betz certainly learned nothing new then about what the bank's state of mind was at the time she opened her ac-count. The panel seems to attribute some significance to the fact that in June 2002 the bank refused to make good Betz's losses. But what does that have to do with scienter or Betz's theory of liability?

[4] The panel also cites two of our cases that stand for the unremarkable proposition that falling stock prices alone do not always put plain-tiffs on inquiry notice of fraud. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005); *Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996). Those cases aren't relevant to the question of whether plaintiff must always have proof of scienter to trigger the statute of limitations, because the fraud there was a

(footnote continued...)

Pharmaceutical Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) (Posner, C.J.), holds just the opposite. Fujisawa considered the panel's position:

> [Plaintiff] contends that the statute of limitations doesn't begin to run until the victim has in hand all the facts he needs in order to bring suit immediately . . . .

Id. at 1334. But unlike our panel, the Seventh Circuit saw the obvious problem with this approach: If the statute doesn't start to run until plaintiff has proof of every element of his claim, plaintiff has no incentive to bring suit promptly. Instead, he will often prefer a "wait-and-see" approach:

> On this view, the potential plaintiff can complete his investigation, draft his complaint, and put the complaint in a drawer to be taken out in a year and filed if the price of the stock has fallen.

Id.

Such delay is unfair to defendants, as the Fourth Circuit recognized in a similar case. While plaintiff is waiting to see whether his investment recovers on its own, defendant "loses the security of

---

(continued from previous page)
misrepresentation about the value of the underlying asset. A falling share price is, at best, only indirect evidence of such fraud. Here, by contrast, the falling price was direct—and incontrovertible—proof that the investment was riskier than allegedly promised.

knowing when legal action against him has been foreclosed." *Brumbaugh*, 985 F.2d at 162. Plaintiff, by contrast, gets the benefit of a "heads I win, tails you lose" bet: If the investment goes up, he reaps the profit; if it goes down, he gets to recover his losses in court. Worse still, plaintiff's delay may prejudice defendant's case as "[m]emories fade, documents are lost, [and] witnesses become unavailable." *Id.* If plaintiff spins out the statute of limitations long enough, he may be able to "coerce settlement[ ] simply because aging has improved an originally meritless claim." *Id.* After this opinion, we might as well rename the PSLRA in the Ninth Circuit as the SPLFEA (Securities Plaintiffs Lawyers' Full Employment Act).

For all those reasons, every other circuit to consider the issue has followed the rule explained in *Brumbaugh* and *Fujisawa*: "[T]he facts that put the victim of the fraud on notice can fall short of actual proof of fraud." *Fujisawa*, 115 F.3d at 1335. Five other circuits state the point just as bluntly. *See Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 564 (6th Cir. 2005) (plaintiff "may not delay the commencement of the statute of limitations until after it has secured direct evidence of [defendant's] culpability"); *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1283 (11th Cir. 2005) ("[i]nquiry notice is triggered by evidence of the possibility of fraud," not "[f]ull exposition of the scam" itself (internal quotation marks omitted)); *Sterlin*, 154 F.3d at 1203; *Dodds*, 12 F.3d at 352 ("An investor does not have to have notice of the entire fraud being perpetrated to be on inquiry

notice."); *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802 (1st Cir. 1987).

Other circuits express the same idea by analogizing inquiry notice to "storm warnings"—hints that something may be amiss so that the investor needs to start asking some hard questions. A plaintiff has storm warnings—and is therefore on inquiry notice—long before the storm itself is upon him. Where, as here, an investor is promised a certain return on a risk-free investment, but instead loses money by the bushel, the losses are storm warnings that the promise may have been a lie. *See Sudo Props., Inc. v. Terrebonne Parish Consol. Gov't*, 503 F.3d 371, 377 (5th Cir. 2007) (decline in value of plaintiff's investment is a "storm warning" putting plaintiff on notice that defendant's promises were lies); *Mathews*, 260 F.3d at 252 ("storm warnings" include "information . . . that conflicts with representations that were made when the securities were originally purchased"); *Davidson v. Wilson*, 973 F.2d 1391, 1402 (8th Cir. 1992) ("storm warnings" include reports from defendants showing "a substantial discrepancy between the amounts promised and those actually received"). We are the only circuit to hold that plaintiff has no storm warnings until the hurricane makes landfall.

The panel makes matters even worse by throwing a second pipe wrench into the machinery of the statute of limitations. As an alternative ground, the panel holds that, even if Betz was on inquiry notice of possible fraud—and thus had a duty to inquire—the bank thwarted her inquiries

by giving her "assurances" that her fortunes would improve. Slip op. at 1669. Because of those assurances, the panel tells us, a reasonable investor in Betz's position just couldn't have figured out that the bank had lied and therefore would have had no grounds for filing suit. That's truly what they say; check it out. *Id.*

There is a handful of cases where a defendant's outright lies and malfeasances prevented an investor who made diligent inquiries from discovering *facts known only to the defendant*. In such cases, courts have held that the statute wasn't triggered. For instance, the panel cites *SEC v. Seaboard Corp.*, 677 F.2d 1301 (9th Cir. 1982), where plaintiff claimed he asked defendant tough questions about facts that were in defendant's exclusive possession, and defendant responded by lying about those facts. As a result, plaintiff held off suing. *Id.* at 1309-10. Applying a pre-*Celotex* standard,[5] we held that there was a factual dispute as to whether plaintiff could have discovered those facts on his own. *Id.*; *see also, e.g.*, *Marks v. CDW*

---

[5] Four years after we decided *Seaboard*, the Supreme Court revised the standard for summary judgment in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Along with two other cases decided that Term, *Celotex* "signal[ed] to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A Charles Alan Wright et al., Federal Practice and Procedure § 2727 (3d ed. 1998). It's unclear how *Seaboard* would come out in a post-*Celotex* world.

Computer Ctrs., Inc., 122 F.3d 363, 365-66 (7th Cir. 1997) (plaintiff inquired about fraud but defendant lied and refused to allow plaintiff to inspect the company's books).

But ours is not a case where defendant thwarted plaintiff from developing the facts. Indeed, Betz doesn't claim that the bank misrepresented any facts. The bank did not, for example, tell Betz that she still had 100 percent of her principal, even though the statements didn't show it. Quite the opposite: The bank *confirmed* that Betz's principal was gone. The bank did predict she would get her money back when the stock market recovered, but such a statement only confirms that plaintiff's investment is subject to market fluctuations and is therefore not free from risk. A defendant who conceals facts may conceivably prevent a reasonably diligent investor from discovering the truth, but a defendant who jollies a disappointed investor along with sunny forecasts of future bull markets conceals nothing and thus does not prevent the investor from gathering enough information to bring suit.

The panel's alternate ruling is as bad as the first, perhaps worse. One wonders what a securities defendant could say to an unhappy investor that would *not*, under the panel's loosey-goosey standard, toll the statute of limitations forever, no matter how many storm warnings the investor has received. If gale-force winds that uproot half of one's property can be neutralized by a forecast of clear skies and mild breezes to come, then anything a defendant may say or refuse to say will, under

the panel's holding, constitute deliberate concealment that prevents plaintiff from learning what he needs to bring suit. Needless to say, no other circuit has hacked this gaping hole into the statute of limitations. *See, e.g., Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) (defendants attributed poor performance to a market recession, rather than fraud, but that couldn't have prevented plaintiffs from discovering the facts needed to bring suit); *De la Fuente v. DCI Telecomms., Inc.*, 206 F.R.D. 369, 385 (S.D.N.Y. 2002) (defendants' disclosures were "tempered with positive statements," but that optimism couldn't have prevented investors from discovering the facts needed to bring suit).

* * *

By holding that only a jury can decide when the statute of limitations is triggered, the panel parts company with ten other circuits and forces defendants to trial even where the historical facts aren't in dispute. By inventing a rule that the statute isn't triggered until plaintiff gets proof of every element of his claim, including scienter, the panel again breaks with ten other circuits and takes our law even deeper into uncharted waters. And by holding that the statute stops running the moment defendant makes a cheerful noise, the panel effectively writes the statute of limitations off the books. Businesses unfortunate enough to be sued in this circuit for securities fraud might as well forget about 28 U.S.C. § 1658(b)(1); it is nothing but a filigree on the statutory page.

Appendix C

APPENDIX C

[Filed October 4, 2007]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEIDE BETZ,

Plaintiff-Appellant,

v.

TRAINER WORTHAM & COMPANY, INC.; DAVID P. COMO; FIRST REPUBLIC BANK, a Nevada corporation; ROBERT VILE,

Defendants-Appellees.

No. 05-15704

D.C. No. CV-03-03231-SI

OPINION

Appeal from the United States District Court for the Northern District of California Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted February 12, 2007—San Francisco, California

Filed October 4, 2007

Before: John T. Noonan, Jr., Ronald M. Gould, and Johnnie B. Rawlinson, Circuit Judges

Opinion by Judge Gould

COUNSEL

Joseph M. Alioto, San Francisco, California, Theodore F. Schwartz, St. Louis, Missouri, and Myron Moskovitz, Berkeley, California, for the plaintiff-appellant.

Sara B. Brody and Alexander M.R. Lyon, Heller Ehrman, LLP, San Francisco, California, for the defendants-appellees.

OPINION

GOULD, Circuit Judge:

We must decide whether Heide Betz's federal securities fraud claim is barred by the statute of limitations.[1] We hold that there is a genuine issue of material fact whether Betz's claim is time barred, and we reverse the district court's summary judgment for the defendants.

I

On an appeal of summary judgment we, like the district court, view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

---

[1] In a separately-filed memorandum disposition, we resolve Betz's appeal of the district court's disposition of her state law claims.

Viewed in the light most favorable to Betz, the facts are as follows:

In 1999, Betz, a retired art dealer, sold her house for $2.2 million. Betz planned to buy a co-op and invest the proceeds of the sale of her house to provide interest income. An employee of First Republic Bank named Carmen Castro introduced Betz to David Como, an employee of Trainer Wortham, an investment subsidiary of First Republic Bank. Como and Castro recommended that Betz invest the proceeds from the sale of her house with Trainer Wortham. Como and Castro assured Betz that, if she invested her $2.2 million with Trainer Wortham, she could withdraw $15,000 per month from her portfolio, for living expenses, without touching the $2.2 million in principal. Betz told Como and Castro that she knew nothing about stocks and bonds and that she only would understand the "bottom line," or total balance, of her account.

According to Betz, on June 7, 1999, Betz entered into an oral agreement with Como, who was acting on behalf of Trainer Wortham, giving the defendants control over her $2.2 million. Betz and Como agreed that Como would invest Betz's money "in such a fashion that [Betz] would receive $15,000 a month from the profit of the investment and that [the defendants] would not touch the principal." The same day, Betz and Como, who was again acting on Trainer Wortham's behalf, entered into a written "Letter of Understanding for Portfolio Management and Administration Services" and an "Investment Management Agreement." These documents explicitly stated that Betz's account was

subject to market risk and that "no person has represented to [Betz] that any particular result can or will be achieved." However, these documents also contained no "merger" or "integration" clauses and made no reference to the alleged oral agreement regarding Betz's $15,000 in monthly maintenance income.

After Betz opened her account with Trainer Wortham, she received account statements at least once per month. In February 2000, Betz received a statement reflecting an account value below her initial investment of $2.2 million. Between February 2000 and July 2001, Betz received twenty-nine more account statements, each reflecting an account balance of less than $2.2 million. In March 2001, Betz's account balance had dropped to $848,000. Around that time, Betz spoke with Robert Vile, a Trainer Wortham employee, to express concern about the declining value of her account. Vile told Betz that the declining balance was attributable to her monthly $15,000 withdrawals; he assured her, however, that the shortfall was temporary, that the market would recover, and that in a year or less her account balance would be back to $2.2 million. When subsequent account statements showed the balance of Betz's account continuing to fall, she met with Castro, who told her that there was a "serious problem" with the way Betz's portfolio had been managed and that the president of Trainer Wortham, Charles Moore, would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." In May 2002, after Betz had met

with Moore in person, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." However, in June 2002, Castro advised Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account.

Betz filed her complaint in this case on July 11, 2003, alleging that Como, Vile, Trainer Wortham, and First Republic Bank (collectively, "Trainer Wortham" or "defendants") had committed securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. The defendants moved for summary judgment on the ground that Betz's federal securities fraud claim was barred by the statute of limitations. Section 804(a) of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 801 (codified at 28 U.S.C. § 1658(b)), provides that a suit for securities fraud under § 10(b) of the Securities Exchange Act must be filed "not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." The district court held that, because Betz had inquiry notice of the defendants' violations of § 10(b) before July 11, 2001, Betz's claims were time barred, and on this ground the district court granted summary judgment for the defendants.

II

We review de novo the district court's grant of summary judgment. *Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 877 n.11 (9th Cir. 2006). Federal Rule of Civil Procedure 56(c) entitles a party to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As we noted above, in deciding a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

III

The defendants contend that Betz's suit is time barred because she had both actual and inquiry notice of the facts giving rise to her claim. Betz contends that she had neither.

We first address actual notice. Betz's suit is timely only if she filed it "not later than . . . 2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). Viewing the facts in the light most favorable to Betz, there is a genuine issue of fact about whether Betz actually discovered that she had a claim against the defendants for securities fraud more than two years before she filed her suit on July 11, 2003. For Betz to have a claim under § 10(b), the defendants must have had, among other things, scienter, which is the "mental state embracing intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668

(1976); *see also Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1047 (9th Cir. 2006) (listing the elements of a federal securities fraud claim), *petition for cert. filed sub nom. Avis Budget Group, Inc. v. Cal. State Teachers Ret. Sys.*, No. 06-560 (U.S. filed Oct. 19, 2006). In *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 974 (9th Cir. 1999), we held that to adequately plead scienter, a § 10(b) plaintiff "must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." We went on to describe this heightened pleading standard as follows:

> Our holding rests, in part, on our conclusion that Congress intended to elevate the pleading requirement above the Second Circuit standard requiring plaintiffs merely to provide facts showing simple recklessness or a motive to commit fraud and opportunity to do so. We hold that although facts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness. In order to show a strong inference of deliberate recklessness, plaintiffs must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity. Accordingly, we hold that particular facts giving rise to a strong inference of deliberate recklessness, at a minimum,

> is required to satisfy the heightened pleading standard under the PSLRA.

Id.

We cannot say that, as a matter of law, Betz, before July 11, 2001, actually discovered facts suggesting that the defendants consciously or deliberately and recklessly deceived her. Under the version of facts presented by Betz, a reasonable factfinder could conclude that Betz did not discover that the defendants intentionally misled her into believing that she could withdraw $15,000 per month without depleting her principal until June 2002, when Moore told her that Trainer Wortham was "not going to do anything" to fix her account.

If the statute of limitations began running only upon Betz's actual discovery of the facts giving rise to her securities fraud claim, this would end our inquiry. However,the defendants contend that, even if Betz did not actually discover the facts underlying her claim before July 11, 2001, Betz was on "inquiry notice" of her claim before that date, and that her claim therefore is still barred by the statute of limitations. We address that argument in the next section.

IV

A

We have held that the statute of limitations for a federal securities fraud claim begins to run when the plaintiff has either actual or inquiry notice that the defendants have made a fraudulent misrepresentation. *See, e.g., Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996); *Volk v. D.A.*

Davidson & Co., 816 F.2d 1406, 1412 (9th Cir. 1987). In more recent cases, however, it has been suggested that under the United States Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), only actual notice of the facts forming the alleged fraud, and not inquiry notice of those facts, triggers the running of the statute of limitations for a § 10(b) claim.[2] *See Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999); *see also Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005). The uncertainty introduced by our opinion in *Berry* led us to suggest in *Livid Holdings* that, notwithstanding our unequivocal pre-*Lampf* case law, we had "considered, but not made a final determination on whether actual or inquiry notice of the alleged fraud triggers the running of Rule 10b-5's statute of limitations." *Livid Holdings*, 416 F.3d at 951.

In *Lampf*, the Supreme Court resolved a split among the circuits regarding the statute of limitations applicable to a § 10(b) claim. *See Lampf*, 501 U.S. at 354. Some circuits had borrowed state statutes of limitations, while others had established a unique federal limitations period. *See*

---

[2] Though *Gray* was decided after the Supreme Court handed down *Lampf*, in *Gray* we applied pre-*Lampf* statute of limitations principles pursuant to 15 U.S.C. § 78aa-1(a), which provides that pre-*Lampf* limitations periods apply to suits filed before *Lampf* was decided. *See Gray*, 82 F.3d at 879 n.1, 880-81.

id. at 354 n.1. The Supreme Court in *Lampf* held that the statute of limitations provided in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e), was the appropriate standard. *See Lampf*, 501 U.S. at 364 n.9. Section 9(e) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."[3] No one disputes that "discovery" can occur when a plaintiff actually discovers facts giving rise to his or her claim. However, *Lampf* left it to the lower courts to decide whether "discovery" occurs *only* upon actual notice or whether "discovery" can occur on some form of inquiry notice.

We hold that either actual or inquiry notice can start the running of the statute of limitations on a federal securities fraud claim. While it is unquestioned that actual notice can mark the beginning of the limitations period, two things happened in the aftermath of *Lampf* that convince us that an inquiry notice standard should also apply to federal securities fraud claims. First, the courts of appeal in our sister circuits, along with the district courts in our own circuit, have uniformly embraced inquiry notice. In fact, "every circuit to have addressed the issue since *Lampf* has

---

[3] The one year/three year limitations period set forth in § 9(e) still applies to securities fraud suits filed before the enactment date of Sarbanes-Oxley, July 30, 2002. *See* Sarbanes-Oxley Act § 804(b).

held that inquiry notice is the appropriate standard." *Berry*, 175 F.3d at 704; *see Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1267-68 (11th Cir. 2006); *Shah v. Meeker*, 435 F.3d 244, 249 (2d Cir. 2006); *Glaser v. Enzo Biochem, Inc.*, 126 Fed. App'x 593, 597 (4th Cir. 2005) (citing *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993)); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002); *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Ritchey v. Horner*, 244 F.3d 635, 638-39 (8th Cir. 2001); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1200 (10th Cir. 1998); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 367 (7th Cir. 1997); *Topalian v. Ehrman*, 954 F.2d 1125, 1134-35 (5th Cir. 1992). Likewise, the district courts in our circuit regularly apply an inquiry notice standard to § 10(b) claims. *See, e.g., In re Micron Techs., Inc. Sec. Litig.*, No. CV-06-085-S-BLW, 2007 U.S. Dist. LEXIS 12446, 2007 WL 576468, at *4 (D. Idaho Feb. 21, 2007); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1026 (S.D. Cal. 2005); *In re Infonet Servs. Corp. Secs. Litig.*, 310 F. Supp. 2d 1106, 1113 (C.D. Cal. 2003); *Getty v. Harmon*, 53 F. Supp. 2d 1053, 1055 (W.D. Wash. 1999); *Freedman v. Louisiana-Pacific Corp.*, 922 F. Supp. 377, 395 (D. Or. 1996); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1099 (N.D. Cal. 1994), aff'd, 95 F.3d 922 (9th Cir. 1996); *Aizuss v. Commonwealth Equity Trust*, 847 F. Supp. 1482, 1486 (E.D. Cal. 1993). While not binding on us, the reasoned opinions of ten of our sister circuits and the

widespread practices of the district courts in our own circuit weigh heavily in favor of holding that inquiry notice can trigger the running of the statute of limitations on a securities fraud claim. The uniformity of the precedent in this direction sends a signal message that inquiry notice, and not merely actual notice, can cause the statute of limitations for securities fraud to begin to run.

The second post-*Lampf* event that convinces us that an inquiry notice standard is appropriate is an act of Congress. In the Sarbanes-Oxley Act of 2002, Congress extended the limitations period for § 10(b) suits from "one year after the discovery of the facts constituting the violation," 15 U.S.C. § 78i(e), to "2 years after the discovery of the facts constituting the violation" for actions commenced after July 30, 2002, 28 U.S.C. § 1658(b); Sarbanes-Oxley Act, § 804(b). In its new enactment, Congress opted for language identical to the language previously in effect in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e). The Supreme Court has instructed that we should assume that Congress is aware of the prevailing case law and legislates in its light. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982) (interpreting the Commodity Exchange Act in light of pre-enactment case law). In 2002, the prevailing case law in the lower federal courts interpreted the language of § 9(e) to mean that the limitations period could be

commenced upon some form of inquiry notice. By choosing language nearly identical to the language of § 9(e), Congress implicitly approved of that case law. *See Cannon*, 441 U.S. at 696-99 (interpreting Title IX to provide a private cause of action because Congress used language identical to that found in Title VI, which had already been interpreted by the courts to provide a private cause of action); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (holding that the silence of the Class Action Fairness Act regarding the burden of proving removal jurisdiction indicated Congressional intent to leave intact the common law rule placing the burden on the defendant); *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002) (noting that "[i]n construing statutes, we presume Congress legislated with awareness of relevant judicial decisions" and holding that Congress's failure to explicitly include "tribal governments" within the Federal Juvenile Delinquency Act's definition of "State," when amending other parts of the Act, "may be interpreted as an endorsement of the judicial decisions excluding tribes from the definition of 'State' ").

We recognize that the pragmatic effects of applying an inquiry notice standard to § 10(b) are both positive and negative for individual litigants. As was suggested in *Berry*, a case decided under the old one-year limitations period, such a standard may compel plaintiffs to file a suit based on "skimpy facts." *See Berry*, 175 F.3d at 704 n.6 (quoting Charles Benjamin Nutley, Comment, *Triggering One-Year Limitations on Section 10(b)*

and Rule 10b-5 Actions: Actual or Inquiry Discovery?, 30 San Diego L. Rev. 917, 948 (1993)). However, Congress's extension of the relevant limitations period from one to two years alleviates this concern and allows us to conclude that an inquiry notice standard strikes an acceptable balance between the interest in requiring plaintiffs promptly to file suit and the competing interest in avoiding the encouragement of baseless or premature suits by requiring plaintiffs to sue before they can discover the facts underlying their claims. *See New England Health Care Employees Pension Fund*, 336 F.3d at 501; *Young*, 305 F.3d at 9; *Sterlin*, 154 F.3d at 1202.

B

We have previously stated that, if we were to adopt an inquiry notice standard for § 10(b) suits, we would apply a standard similar to that applied by the Tenth Circuit. *See Livid Holdings*, 416 F.3d at 951; *Berry*, 175 F.3d at 704. Today we adopt the inquiry-plus-reasonable-diligence test used by the Tenth Circuit. *See, e.g., Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201 (10th Cir. 1998) (holding that inquiry notice "triggers an investor's duty to exercise reasonable diligence and that the . . . statute of limitations period begins to run once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud."). Under that standard, to determine when the statute of limitations begins running, we first determine when the plaintiff had inquiry notice of the facts giving rise to his or her securities fraud claim. A plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a

reasonable investor to investigate the matter further. Like our sister circuits, we caution that inquiry notice should not be construed so broadly that the particular plaintiff cannot bring his or her suit within the limitations period. The facts constituting inquiry notice "must be sufficiently probative of fraud—sufficiently advanced beyond the stage of a mere suspicion . . . to incite the victim to investigate." *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997), *quoted in Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005). Once a plaintiff has inquiry notice, we ask when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. The answer to that second question tells us when the statute of limitations began to run.

The question of whether inquiry notice exists is objective and contemplates a "reasonable investor" or "reasonable person" standard. *See, e.g., Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 193 (2d Cir. 2003) (citations and internal quotation marks omitted) (holding that inquiry notice of securities fraud is triggered when the plaintiff receives "sufficient storm warnings to alert a reasonable person to the probability that there were either misleading statements or significant omissions involved"); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (holding that inquiry notice exists where "a reasonable investor of ordinary intelligence would have discovered the [suspicious] information and recognized it" as suspicious); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir.

1997) (inquiry notice is present "when the victim is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge of the defendant's misrepresentations."). The existence of inquiry notice is only the first prong of the two-part notice-plus-reasonable-diligence test that we are today adopting, and the second stage of that inquiry, the question of whether the plaintiff exercised reasonable diligence in investigating the facts underlying the alleged fraud, while remaining essentially objective in character, necessarily entails an assessment of the plaintiff's particular circumstances from the perspective of a reasonable investor. In this second stage of the inquiry, one of the factors to be considered is whether the plaintiff was given any assurances by a defendant after beginning to investigate the suspicious circumstances that would have delayed discovery of the fraud by a reasonable person in the plaintiff's position. For example, in a situation much like the instant case, we have held that, when an investor met with representatives of a defendant company about possible fraud and was assured that there "had been no improprieties," whether the statute of limitations began running was a question for the trier of fact. *See SEC v. Seaboard Corp.*, 677 F.2d 1301, 1310 (1982). In that case, we concluded that "the question of what a reasonable investor would have done [under those circumstances] is not so certain as to allow a determination as a matter of law." *Id.*

Moreover, under the notice-plus-reasonable-diligence standard we apply to securities fraud

claims, the defendant bears a considerable burden in demonstrating, at the summary judgment stage, that the plaintiff's claim is time barred. *See Seaboard Corp.*, 677 F.2d at 1309-10 (noting that "the question of notice of fraud is for the trier of fact" and that "the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice"). "Summary judgment is appropriate only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Gray*, 82 F.3d at 881 (internal quotations omitted); *see also Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The question of what a reasonably prudent investor should have known is particularly suited to a jury determination.").[4] Our hesitation to approve

---

[4] We have in some cases resolved by summary judgment the question of whether a federal securities plaintiff had sufficient notice of alleged fraud to trigger the statute of limitations. In Davis v. Birr, Wilson & Co., 839 F.2d 1369 (9th Cir. 1988), for example, we concluded that summary judgment on the issue of notice was proper because the plaintiff was a well-educated and experienced investor who made suggestions to his broker about his portfolio and who described himself as a "sophisticated investor." Id. at 1370. By contrast, Betz had informed the defendants that she had no experience with stocks or bonds and would only understand the bottom line of her account statements, and thereafter, if we credit Betz's testimony, received specific assurances from the president of Trainer Wortham that her account problems would be resolved and that she should forego suit. We also affirmed a summary judgment recognizing inquiry notice in the

(footnote continued...)

summary judgment in securities fraud cases is especially pronounced where the plaintiff alleges that the defendants' reassurances convinced the

---

(continued from previous page)
case of Volk v. D.A. Davidson & Co., 816 F.2d 1406 (9th Cir. 1987). Volk involved several investors who purchased limited partnership interests in coal mining operations marketed as tax shelters and who were subsequently informed by the general partner both through a letter and an annual report that the partnership properties did not contain minable coal reserves as warranted and that the investors might therefore not be legally entitled to the tax deductions they had been taking. Id. at 1409-10. The investors argued that the statute of limitations on their securities fraud claim did not begin running until the IRS disallowed their deductions and they first suffered out-of-pocket losses, but the court held as a matter of law that the statute began to run when they received the letter and annual report from the general partner putting them on inquiry notice of the problem with the coal reserves. See id. at 1411. However, Volk differs from the case before us in that the warnings that the Volk investors received indicated a much more permanent and fundamental type of problem with the underlying investment than the declining account balances experienced by Betz, which, at least in theory, could have reversed themselves over time. In addition, while some of the investors in Volk also received reassurances from the defendant investment company when they expressed concerns about the general partner's communications, these assurances took the general form of admonitions "not to worry" about the letter. id., whereas in Betz's case she claims that she was specifically promised that the president of Trainer Wortham would remedy the problems with her account because it was "the right thing to do" and that in the meantime she should refrain from taking any legal action against the company.

plaintiff to postpone his or her legal action. *See Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984).

We now turn to the facts of this case. Under our inquiry notice standard outlined above, and keeping in mind that this case is before us on summary judgment, we ask whether there is a genuine dispute about whether there existed facts sufficiently probative of fraud to cause a reasonable investor to conduct a further investigation. Viewing the facts in the light most favorable to Betz, a rational jury could conclude that a reasonable investor in Betz's shoes would not have initiated further inquiry before July 11, 2001.

The defendants contend that the account statements Betz received would have spurred a reasonable investor to inquire further whether Trainer Wortham had defrauded her. However, the account statements indicated, at most, that the defendants had failed to fulfill their oral promise that Betz could withdraw $15,000 per month from her account without depleting the principal. As a matter of law, we cannot say that a declining account balance, in and of itself, would have spurred a reasonable investor to further inquire whether he or she had been *defrauded*. *See Gray*, 82 F.3d at 881 ("It is well settled that poor financial performance, standing alone, does not necessarily suggest securities fraud . . ., but could also be explained by poor management, general market conditions, or other events unrelated to fraud, creating a jury question on inquiry notice."); *see also Livid Holdings*, 416 F.3d at 951 ("This court

has held that financial problems alone are generally insufficient to suggest fraud.").

Likewise, Castro's statement that there was a "serious problem" with Betz's portfolio did nothing more than indicate to Betz that the defendants had not been able to make good on their promise of at least $15,000 per month in interest income. Because such a statement provided no evidence that the defendants had intentionally or deliberately and recklessly misled Betz as *Silicon Graphics* requires to state a claim for securities fraud, *see Silicon Graphics*, 183 F.3d at 974, a rational jury could conclude that, upon hearing such a statement, a reasonable investor would not have initiated further inquiry into the existence of fraud. *See Fujisawa Pharm.*, 115 F.3d at 1335 (noting that "[t]he facts constituting [inquiry] notice must be sufficiently probative of *fraud*" (emphasis added)).

Moreover, even if Betz was on inquiry notice of fraud, under the second prong of our inquiry notice standard, we cannot say that, as a matter of law, Betz, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. In this case, Betz questioned the defendants about her account and the defendants assured her that they would take care of any problems and asked her not to file suit. In *Seabord Corp.*, the defendant's giving of assurances in response to a codefendant's inquiries, which had the effect of lulling the codefendant and delaying the onset of legal action, was held to preclude summary judgment and create an issue for the trier of fact as to when the statute of limitations began to run. *See*

Seaboard Corp., 677 F.2d at 1310. Trainer & Wortham's assurances to Betz in this case, which were given as recently as May of 2002, similarly give rise to a fact issue which makes summary judgment inappropriate.

We do not suggest, however, that there is a *per se* rule that in all cases involving assurances from a brokerage firm to an investor, the issue of inquiry notice must go to a jury. Rather, we conclude that here, in the total circumstances, and from the point of view of a reasonable investor, there was a genuine issue whether Betz should be held to have had notice of securities fraud.

V

In summary, we hold that, once there exists sufficient indicia of fraud to cause a reasonable investor to inquire into whether he or she has been defrauded, the statute of limitations on a claim under § 10(b) of the Securities Exchange Act begins running when the investor, in the exercise of reasonable diligence, should have discovered the facts giving rise to his or her claim. In this case, we cannot say that, as a matter of law, a reasonable investor in Betz's position should have discovered the facts giving rise to her claim before July 11, 2001, especially in light of the express assurances made by Defendants that they would remedy the problems with the account, which may have lulled a reasonable investor into inaction. Thus, a jury must determine whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her

account and all would be made right. We reverse the district court's judgment in favor of the defendants and remand this case for further proceedings consistent with our opinion.

REVERSED AND REMANDED.

Appendix D

APPENDIX D

[Filed September 14, 2007]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEIDE BETZ, *Plaintiff-Appellant,* v. TRAINER WORTHAM & COMPANY, INC.; DAVID P. COMO; FIRST REPUBLIC BANK, a Nevada corporation; ROBERT VILE, *Defendants-Appellees.*	No. 05-15704 D.C. NO. CV-03-03231-SI Northern District of California, San Francisco ORDER

Filed September 14, 2007

Before: John T. Noonan, Ronald M. Gould, and Johnnie B. Rawlinson, Circuit Judges.

ORDER

The Petition for Panel Rehearing is GRANTED. The opinion in the above-captioned matter filed on May 11, 2007, and published at 486 F.3d 590, is WITHDRAWN. A modified opinion shall be filed and substituted.

The parties shall have fourteen (14) days from entry of the modified opinion to file petitions for rehearing or petitions for rehearing en banc in the above-captioned matter.

IT IS SO ORDERED.

Appendix E

APPENDIX E

[Filed May 11, 2007]

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HEIDE BETZ, *Plaintiff-Appellant,* v. TRAINER WORTHAM & COMPANY, INC.; DAVID P. COMO; FIRST REPUBLIC BANK, a Nevada corporation; ROBERT VILE, *Defendants-Appellees.*	No. 05-15704 D.C. No. CV-03-03231-SI OPINION

Appeal from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted
February 12, 2007—San Francisco, California

Filed May 11, 2007

Before: John T. Noonan, Jr., Ronald M. Gould, and Johnnie B. Rawlinson, Circuit Judges

Opinion by Judge Gould

OPINION

GOULD, Circuit Judge:

We must decide whether Heide Betz's federal securities fraud claim is barred by the statute of limitations.[1] We hold that Betz's claim is not time barred, and we reverse the district court's summary judgment for the defendants.

I

On an appeal of summary judgment we, like the district court, view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Viewed in the light most favorable to Betz, the facts are as follows:

In 1999, Betz, a retired art dealer, sold her house for $2.2 million. Betz planned to buy a co-op and invest the proceeds of the sale of her house to provide interest income. An employee of First Republic Bank named Carmen Castro introduced Betz to David Como, an employee of Trainer Wortham, an investment subsidiary of First Republic Bank. Como and Castro recommended that Betz invest the proceeds from the sale of her house with Trainer Wortham. Como and Castro assured Betz that, if she invested her $2.2 million

---

[1] In a separately-filed memorandum disposition, we resolve Betz's appeal of the district court's disposition of her state law claims.

with Trainer Wortham, she could withdraw $15,000 per month from her portfolio, for living expenses, without touching the $2.2 million in principal. Betz told Como and Castro that she knew nothing about stocks and bonds and that she only would understand the "bottom line," or total balance, of her account.

According to Betz, on June 7, 1999, Betz entered into an oral agreement with Como, who was acting on behalf of Trainer Wortham, giving the defendants control over her $2.2 million. Betz and Como agreed that Como would invest Betz's money "in such a fashion that [Betz] would receive $15,000 a month from the profit of the investment and that [the defendants] would not touch the principal." The same day, Betz and Como, who was again acting on Trainer Wortham's behalf, entered into a written "Letter of Understanding for Portfolio Management and Administration Services" and an "Investment Management Agreement." These documents explicitly stated that Betz's account was subject to market risk and that "no person has represented to [Betz] that any particular result can or will be achieved."

After Betz opened her account with Trainer Wortham, she received account statements at least once per month. In February 2000, Betz received a statement reflecting an account value below her initial investment of $2.2 million. Between February 2000 and July 2001, Betz received twenty-nine more account statements, each reflecting an account balance of less than $2.2 million. In March 2001, Betz's account balance had

dropped to $848,000. Around that time, Betz spoke with Robert Vile, a Trainer Wortham employee, to express concern about the declining value of her account. Vile told Betz that the declining balance was temporary, that the market would recover, and that in less than a year her account balance would be back to $2.2 million.

However, a year later, in the spring of 2002, Betz's account balance had not recovered. At that time, Castro told Betz that there was a "serious problem" with the way Betz's portfolio had been managed and that the president of Trainer Wortham, Charles Moore, would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." After Betz met with Moore in person, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." However, in June 2002, Castro advised Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account.

Betz filed her complaint in this case on July 11, 2003, alleging that Como, Vile, Trainer Wortham, and First Republic Bank (collectively, "Trainer Wortham" or "defendants") had committed securities fraud in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. The defendants moved for summary judgment on the ground that Betz's federal securities fraud claim was barred by

the statute of limitations. Section 804(a) of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 801 (codified at 28 U.S.C. § 1658(b)), provides that a suit for securities fraud under § 10(b) of the Securities Exchange Act must be filed "not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." The district court held that, because Betz had inquiry notice of the defendants' violations of § 10(b) before July 11, 2001, Betz's claims were time barred, and on this ground the district court granted summary judgment for the defendants.

II

We review de novo the district court's grant of summary judgment. *Olympic Pipeline Co. v. City of Seattle*, 437 F.3d 872, 877 n.11 (9th Cir. 2006). Federal Rule of Civil Procedure 56(c) entitles a party to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As we noted above, in deciding a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

III

The defendants contend that Betz's suit is time barred because she had both actual and inquiry notice of the facts giving rise to her claim. Betz contends that she had neither.

We first address actual notice. Betz's suit is timely only if she filed it "not later than . . . 2 years after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b). Viewing the facts in the light most favorable to Betz, there is a genuine issue of fact about whether Betz actually discovered that she had a claim against the defendants for securities fraud more than two years before she filed her suit on July 11, 2003. For Betz to have a claim under § 10(b), the defendants must have had, among other things, scienter, which is the "mental state embracing intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976); *see also Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1047 (9th Cir. 2006) (listing the elements of a federal securities fraud claim), *petition for cert. filed sub nom. Avis Budget Group, Inc. v. Cal. State Teachers Ret. Sys.*, No. 06-560 (U.S. filed Oct. 19, 2006). In *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 974 (9th Cir. 1999), we held that to adequately plead scienter, a § 10(b) plaintiff "must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct."

We cannot say that, as a matter of law, Betz, before July 11, 2001, actually discovered that the defendants consciously or deliberately and recklessly deceived her. Under the version of facts presented by Betz, a reasonable factfinder could conclude that Betz did not discover that the defendants intentionally misled her into believing that she could withdraw $15,000 per month

without depleting her principal until June 2002, when Moore told her that Trainer Wortham was "not going to do anything" to fix her account.

If the statute of limitations began running only upon Betz's actual discovery of the facts giving rise to her securities fraud claim, this would end our inquiry. However, the defendants contend that, even if Betz did not actually discover the facts underlying her claim before July 11, 2001, Betz was on "inquiry notice" of her claim before that date, and that her claim therefore is still barred by the statute of limitations. We address that argument in the next section.

IV

A

We have held that the statute of limitations for a federal securities fraud claim begins to run when the plaintiff has either actual or inquiry notice that the defendants have made a fraudulent misrepresentation. *See, e.g., Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996); *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987). In more recent cases, however, it has been suggested that under the United States Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321 (1991), only actual notice of the facts forming the alleged fraud, and not inquiry notice of those facts, triggers the running of the

statute of limitations for a § 10(b) claim.[2] *See Berry v. Valence Tech., Inc.*, 175 F.3d 699, 704 (9th Cir. 1999); *see also Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005). The uncertainty introduced by our opinion in *Berry* led us to suggest in *Livid Holdings* that, notwithstanding our unequivocal pre-*Lampf* case law, we had "considered, but not made a final determination on whether actual or inquiry notice of the alleged fraud triggers the running of Rule 10b-5's statute of limitations." *Livid Holdings*, 416 F.3d at 951.

In *Lampf*, the Supreme Court resolved a split among the circuits regarding the statute of limitations applicable to a § 10(b) claim. *See Lampf*, 501 U.S. at 354. Some circuits had borrowed state statutes of limitations, while others had established a unique federal limitations period. *See id.* at 354 n.1. The Supreme Court in *Lampf* held that the statute of limitations provided in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e), was the appropriate standard. *See Lampf*, 501 U.S. at 364 n.9. Section 9(e) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the

---

[2] Though *Gray* was decided after the Supreme Court handed down *Lampf*, in *Gray* we applied pre-*Lampf* statute of limitations principles pursuant to 15 U.S.C. § 78aa-1(a), which provides that pre-*Lampf* limitations periods apply to suits filed before *Lampf* was decided. *See Gray*, 82 F.3d at 879 n.1, 880-81.

violation and within three years after such violation."[3] No one disputes that "discovery" can occur when a plaintiff actually discovers facts giving rise to his or her claim. However, *Lampf* left it to the lower courts to decide whether "discovery" occurs *only* upon actual notice or whether "discovery" can occur on some form of inquiry notice.

We hold that either actual or inquiry notice can start the running of the statute of limitations on a federal securities fraud claim. While it is unquestioned that actual notice can mark the beginning of the limitations period, two things happened in the aftermath of *Lampf* that convince us that an inquiry notice standard should also apply to federal securities fraud claims. First, the courts of appeal in our sister circuits, along with the district courts in our own circuit, have uniformly embraced inquiry notice. In fact, "every circuit to have addressed the issue since *Lampf* has held that inquiry notice is the appropriate standard." *Berry*, 175 F.3d at 704; *see Fin. Sec. Assurance, Inc. v. Stephens, Inc.*, 450 F.3d 1257, 1267-68 (11th Cir. 2006); *Shah v. Meeker*, 435 F.3d 244, 249 (2d Cir. 2006); *Glaser v. Enzo Biochem, Inc.*, 126 Fed. App'x 593, 597 (4th Cir. 2005) (citing *Brumbaugh v. Princeton Partners*, 985 F.2d 157,

---

[3] The one year/three year limitations period set forth in § 9(e) still applies to securities fraud suits filed before the enactment date of Sarbanes-Oxley, July 30, 2002. *See* Sarbanes-Oxley Act § 804(b).

162 (4th Cir. 1993)); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002); *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Ritchey v. Horner*, 244 F.3d 635, 638-39 (8th Cir. 2001); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1200 (10th Cir. 1998); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 367 (7th Cir. 1997); *Topalian v. Ehrman*, 954 F.2d 1125, 1134-35 (5th Cir. 1992). Likewise, the district courts in our circuit regularly apply an inquiry notice standard to § 10(b) claims. *See, e.g., In re Micron Techs., Inc. Sec. Litig.*, No. CV-06-085-S-BLW, 2007 U.S. Dist. LEXIS 12446, 2007 WL 576468, at *4 (D. Idaho Feb. 21, 2007); *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 1026 (S.D. Cal. 2005); *In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1106, 1113 (C.D. Cal. 2003); *Getty v. Harmon*, 53 F. Supp. 2d 1053, 1055 (W.D. Wash. 1999); *Freedman v. La.-Pac. Corp.*, 922 F. Supp. 377, 395 (D. Or. 1996); *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1099 (N.D. Cal. 1994), *aff'd*, 95 F.3d 922 (9th Cir. 1996); *Aizuss v. Commonwealth Equity Trust*, 847 F. Supp. 1482, 1486 (E.D. Cal. 1993). While not binding on us, the reasoned opinions of ten of our sister circuits and the widespread practices of the district courts in our own circuit weigh heavily in favor of holding that inquiry notice can trigger the running of the statute of limitations on a securities fraud claim. The uniformity of the precedent in this direction sends a signal message that inquiry notice, and not merely actual notice, can cause the

statute of limitations for securities fraud to begin to run.

The second post-*Lampf* event that convinces us that an inquiry notice standard is appropriate is an act of Congress. In the Sarbanes-Oxley Act of 2002, Congress extended the limitations period for § 10(b) suits from "one year after the discovery of the facts constituting the violation," 15 U.S.C. § 78i(e), to "2 years after the discovery of the facts constituting the violation" for actions commenced after July 30, 2002, 28 U.S.C. § 1658(b); Sarbanes-Oxley Act, § 804(b). In its new enactment, Congress opted for language identical to the language previously in effect in § 9(e) of the Securities Exchange Act, 15 U.S.C. § 78i(e). The Supreme Court has instructed that we should assume that Congress is aware of the prevailing case law and legislates in its light. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 379, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982) (interpreting the Commodity Exchange Act in light of pre-enactment case law). In 2002, the prevailing case law in the lower federal courts interpreted the language of § 9(e) to mean that the limitations period could be commenced upon some form of inquiry notice. By choosing language nearly identical to the language of § 9(e), Congress implicitly approved of that case law. *See Cannon*, 441 U.S. at 696-99 (interpreting Title IX to provide a private cause of action because Congress used language identical to that found in

Title VI, which had already been interpreted by the courts to provide a private cause of action); *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) (per curiam) (holding that the silence of the Class Action Fairness Act regarding the burden of proving removal jurisdiction indicated Congressional intent to leave intact the common law rule placing the burden on the defendant); *United States v. Male Juvenile*, 280 F.3d 1008, 1016 (9th Cir. 2002) (noting that "[i]n construing statutes, we presume Congress legislated with awareness of relevant judicial decisions" and holding that Congress's failure to explicitly include "tribal governments" within the Federal Juvenile Delinquency Act's definition of "State," when amending other parts of the Act, "may be interpreted as an endorsement of the judicial decisions excluding tribes from the definition of 'State'").

We recognize that the pragmatic effects of applying an inquiry notice standard to § 10(b) are both positive and negative for individual litigants. As was suggested in *Berry*, a case decided under the old one-year limitations period, such a standard may compel plaintiffs to file a suit based on "skimpy facts." *See Berry*, 175 F.3d at 704 n.6 (quoting Charles Benjamin Nutley, Comment, *Triggering One-Year Limitations on Section 10(b) and Rule 10b-5 Actions: Actual or Inquiry Discovery?*, 30 San Diego L. Rev. 917, 948 (1993)). However, Congress's extension of the relevant limitations period from one to two years alleviates this concern and allows us to conclude that an inquiry notice standard strikes an acceptable

balance between the interest in requiring plaintiffs promptly to file suit and the competing interest in avoiding the encouragement of baseless or premature suits by requiring plaintiffs to sue before they can discover the facts underlying their claims. *See New England Health Care Employees Pension Fund*, 336 F.3d at 501; *Young*, 305 F.3d at 9; *Sterlin*, 154 F.3d at 1202.

B

We have previously stated that, if we were to adopt an inquiry notice standard for § 10(b) suits, we would apply a standard similar to that applied by the Tenth Circuit. *See Livid Holdings*, 416 F.3d at 951; *Berry*, 175 F.3d at 704. Today we adopt the inquiry-plus-reasonable-diligence test used by the Tenth Circuit. Under that standard, to determine when the statute of limitations begins running, we first determine when the plaintiff had inquiry notice of the facts giving rise to his or her securities fraud claim. A plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further. Like our sister circuits, we caution that inquiry notice should not be construed so broadly that the particular plaintiff cannot bring his or her suit within the limitations period. The facts constituting inquiry notice "must be sufficiently probative of fraud—sufficiently advanced beyond the stage of a mere suspicion . . . to incite the victim to investigate." *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997), *quoted in Tello v. Dean Witter Reynolds, Inc.*, 410

F.3d 1275, 1284 (11th Cir. 2005). Once a plaintiff has inquiry notice, we ask when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. The answer to that second question tells us when the statute of limitations began to run.

The question of whether inquiry notice exists is objective. *See, e.g.*, *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997). However, we would be remiss if we ignored the particular circumstances of the plaintiff in the limited cases where equitable considerations properly affect our view of limitations. For that reason, we have held that the running of the statute of limitations is tolled for a naive investor who is lulled into inaction by those that the investor alleges were defrauding him or her. For example, in *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984) (per curiam), the defendant argued that Vucinich's securities fraud, common law fraud, negligence, and breach of fiduciary duty claims were barred by the statute of limitations. *Id.* Vucinich, like Betz in this case, "had been receiving monthly statements which, had she been able to interpret them, would have indicated that the value of her account was declining." *Id.* Vucinich, again like Betz, claimed that "she could not decipher the statements and that she relied on [the defendant's] continuing reassurance that a longer time was needed to realize gains from [the defendant's] strategy." *Id.* Outside the limitations period, Vucinich had

received several margin calls and been told by a friend that the investments the defendant had made for her were speculative. *Id.* At this point, one could argue that a hypothetical "reasonable investor" would have inquired as to whether her broker had been intentionally deceiving her. But we considered Vucinich's inexperience with investments, lack of financial sophistication, and reliance on the defendant's expertise and reversed the district court's grant of summary judgment to the defendant. *Id.* at 1436-37. We held that "[w]hether the events existing as of [the commencement of the limitations period] were sufficient to put Vucinich on notice and whether the reassuring statements of defendant reasonably affected that notice is a disputed question of fact requiring determination by the district court." *Id.* at 1437.

We have held that a primary purpose of the federal securities laws, and in particular § 10(b), "'is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act.'" *Volk*, 816 F.2d at 1413 (quoting *Stull v. Bayard*, 561 F.2d 429, 433 n.4 (2d Cir. 1977)). Ignoring the particular circumstances of the plaintiff and gauging the plaintiff's conduct entirely against that of an abstract "reasonable investor" would undermine this policy in cases where the plaintiff is an unsophisticated investor and the defendants by their words and conduct encourage inaction or delay.

Under the notice-plus-reasonable-diligence standard we apply to securities fraud claims, the defendant bears a considerable burden in demonstrating, at the summary judgment stage, that the plaintiff's claim is time barred. *See SEC v. Seaboard Corp.*, 677 F.2d 1301, 1309-10 (9th Cir. 1982) (noting that "the question of notice of fraud is for the trier of fact" and that "the party seeking summary disposition has an extremely difficult burden to show that there exists no issue of material fact regarding notice"). "Summary judgment is appropriate only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Gray*, 82 F.3d at 881 (internal quotations omitted); *see also Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir. 1984) ("The question of what a reasonably prudent investor should have known is particularly suited to a jury determination."). Our hesitation to approve summary judgment in securities fraud cases is especially pronounced where the plaintiff alleges that the defendants' reassurances convinced the plaintiff to postpone his or her legal action. *See Vucinich*, 739 F.2d at 1436.

We now turn to the facts of this case. Under our inquiry notice standard outlined above, and keeping in mind that this case is before us on summary judgment, we ask whether there is a genuine dispute about whether there existed facts sufficiently probative of fraud to cause a reasonable investor to conduct a further investigation. Viewing the facts in the light most favorable to Betz, a rational jury could conclude that a reasonable

investor in Betz's shoes would not have initiated further inquiry before July 11, 2001.

The defendants contend that the account statements Betz received would have spurred a reasonable investor to inquire further whether Trainer Wortham had defrauded her. However, the account statements indicated, at most, that the defendants had broken their promise that Betz could withdraw $15,000 per month from her account without depleting the principal. As a matter of law, we cannot say that a declining account balance, in and of itself, would have spurred a reasonable investor to further inquire whether he or she had been *defrauded*. *See Gray*, 82 F.3d at 881 ("It is well settled that poor financial performance, standing alone, does not necessarily suggest securities fraud . . ., but could also be explained by poor management, general market conditions, or other events unrelated to fraud, creating a jury question on inquiry notice."); *see also Livid Holdings*, 416 F.3d at 951 ("This court has held that financial problems alone are generally insufficient to suggest fraud.").

Likewise, Castro's March 2002 statement that there was a "serious problem" with Betz's portfolio did nothing more than indicate to Betz that the defendants had not been able to make good on their promise of at least $15,000 per month in interest income. Because such a statement provided no evidence that the defendants had intentionally or deliberately and recklessly misled Betz as *Silicon Graphics* requires to state a claim for securities fraud, *see*

Silicon Graphics, 183 F.3d at 974, a rational jury could conclude that, upon hearing such a statement, a reasonable investor would not have initiated further inquiry into the existence of fraud. *See Fujisawa Pharm.*, 115 F.3d at 1335 (noting that "[t]he facts constituting [inquiry] notice must be sufficiently probative of *fraud*" (emphasis added)).

Even if a reasonable investor would have initiated inquiry into the possibility of fraud, the assurances Betz received from the defendants tolled the statute of limitations on her securities fraud claim. When a defendant reassures a plaintiff that the defendant has not deceived the plaintiff and encourages the plaintiff to defer legal action, and the result is that the plaintiff postpones filing suit, we should be reluctant to grant summary judgment in favor of the defendant on statute of limitations grounds. *See Vucinich*, 739 F.2d at 1436. This holds especially true when the plaintiff is a naive investor, like Betz,[4] who enlists

---

[4] No person with any degree of investment and financial sophistication could have believed that it was possible to receive $15,000 per month, or $180,000 per year, on a portfolio with capital value of $2.2 million, without some significant degree of market risk. Sophisticated investors know that a return exceeding 8% per year cannot be gained without a substantial risk, and the safest investments, in government notes, would likely return not more than half of that rate. When the facts are determined by trial, Betz's factual premises might be rejected, but in this case coming before us after a grant of summary judgment, we must accept as true Betz's

(footnote continued...)

investment professionals and relies on those professionals' expertise, like Betz did. The case is entirely different for a sophisticated investor who would not normally be entitled to any equitable tolling of the limitations period. *See Davis v. Birr, Wilson & Co., Inc.*, 839 F.2d 1369, 1370 (9th Cir. 1988).

Moreover, even if Betz was on inquiry notice of fraud, under the second prong of our inquiry notice standard, we cannot say that, as a matter of law, Betz, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. In this case, Betz questioned the defendants about her account and the defendants assured her that they would take care of any problems and asked her not to file suit. We have held that, when a plaintiff questions a defendant about possible fraud and receives reassurances from the defendant, whether the statute of limitations began running is a question for the trier of fact. *See Seaboard Corp.*, 677 F.2d at 1310. In this case, "the question of what a reasonable investor would have done is not so certain as to allow a determination as a matter of law." *Id.*

(continued from previous page)
testimony that she was told she could gain this level of monthly income with defendants managing her investments and without risking the capital she had gained on the sale of her house.

V

In summary, we hold that, once there exists sufficient indicia of fraud to cause a reasonable investor to inquire into whether he or she has been defrauded, the statute of limitations on a claim under § 10(b) of the Securities Exchange Act begins running when the investor, in the exercise of reasonable diligence, should have discovered the facts giving rise to his or her claim. In this case, we cannot say that, as a matter of law, a reasonable investor in Betz's position should have discovered the facts giving rise to her claim before July 11, 2001. Moreover, the defendants' express assurances that they would remedy the problems with Betz's account lulled Betz, who was not a sophisticated investor, into inaction and thus tolled the statute of limitations on her securities fraud claim. We reverse the district court's judgment in favor of the defendants and remand this case for further proceedings consistent with our opinion.

REVERSED AND REMANDED.

Appendix F

APPENDIX F

[Filed April 5, 2005]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HEIDE BETZ, *Plaintiff,* v. TRAINER WORTHAM & CO., et al., *Defendants.*	No. C 03-03231 SI **ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

JUDGE Susan Illston, United States District Judge

On March 18, 2005, the Court heard oral argument on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. Having carefully considered the arguments of counsel and the papers submitted, the Court hereby DENIES plaintiff's motion and GRANTS defendants' motion for the reasons set forth below.

BACKGROUND

This case concerns defendants' alleged mismanagement of plaintiff's $2.2 million investment portfolio. Plaintiff Heidi Betz entered into a Portfolio Management Agreement with defendant Trainer Wortham & Company on June 7, 1999. Second Am. Compl. ¶ 10. Trainer Wortham is an investment management company directed and managed by defendant First Republic Bank. *Id.* at ¶ 2. Trainer Wortham employed defendants David P. Como and Robert Vile. *Id.* at ¶ 3-4.

Plaintiff alleges that, when she initially met with defendants about investing her money, she told them that she had $2.2 million to invest from the sale of her home and that these funds represented her entire estate. According to plaintiff, she also informed defendants that she was in her late fifties, that she depended on these funds for her long-term support, and that she lacked sophistication regarding financial matters. *Id.* at ¶ 11, 14.

According to plaintiff, defendants made a false and fraudulent oral representation to her that they would invest her money in a manner that would preserve "principal,"[1] while allowing her to withdraw $15,000 per month. *Id.* at ¶ 12. Plaintiff planned to pay $7,500 of the approximately $15,000 per month to defendant First Republic Bank for her outstanding loan from the bank. She alleges that

---

[1] The parties dispute the meaning of this term.

defendants failed to follow industry guidelines because they placed her investments one hundred percent in equities and concentrated them too heavily, approximately sixty-five percent, in "unsuitable high risk investments in volatile technology and telecommunications industries," which were inappropriate for someone of her age and circumstances. *Id.* at ¶ 12, 14, 16. Plaintiff alleges that these representations were false and misleading, and were made to induce her to enter the brokerage agreement with defendants. She also alleges that defendant Trainer Wortham paid a "secret kickback" to defendant First Republic Bank for recommending Trainer Wortham to her. *Id.* at ¶ 12.

During plaintiff's initial discussions with defendants in June 1999, they provided her with various documents, including a standard Trainer Wortham contract, a PowerPoint presentation about Trainer Wortham, and several spreadsheets showing sample investment portfolios, on which plaintiff relied in deciding to open her account. Declaration of Alexander Lyon in Support of Mot. ("Lyon Decl. I") Ex. G; Ex. H; Ex. A at 86:17- 87:21. Specifically, plaintiff testified that, although the spreadsheets were not "explained in detail," "[i]t was this is what we can do for you. At the end of one year you'll have, you know, 2 million 7. At the end of five years you'll have 4 million dollars. And in addition to that we'll take care of you for $15,000 a month." *Id.* at 87:6-16.

Betz alleges that, in November 1999, defendants advised her to trade in a margin account without

advising her of the risks associated with such trading and that she traded on margin to withdraw $350,000 in November 1999 and $70,000 in December 1999. *Id.* at ¶ 19. Furthermore, according to Betz, defendants knew about her lack of experience in stock market investments but failed to explain how to read and interpret the periodic investment statements that defendants provided to her beginning in August 1999. *Id.* at ¶ 21.

Plaintiff's account experienced growth from June 1999 to December 1999. Lyon Decl. Ex. I at P 133-136; P 126-128; P 119-120; P 115-117. In 2000, however, her portfolio began to drop in value, and in February 2000 she received her first statement reflecting an account value below her initial investment amount of $2.2 million. Lyon Decl. I Ex. J at P 217-219. Plaintiff received twenty-one account statements over the course of 2000 and nineteen account statements in 2001 showing a decline in her portfolio below the value of her initial investment. In May 2000, plaintiff called her Trainer Wortham portfolio manager, defendant Robert Vile, and "expressed [her] concern about the drop in [her] portfolio, which was at $1.8 million." Lyon Decl I Ex. D at P 915; Ex. A at 118:25-119:2. In January 2001, she called Vile again to express concern about the further decline to $1.3 million. Lyon Decl I Ex. D at P 915; Ex. A at 119:21-24. On March 6, 2001, she called him "expressing [her] total dismay" because her portfolio was at

$848,000. Lyon Decl. I Ex. D at P 916. On March 21, 2001, plaintiff had lunch with Carmen Castro of First Republic Bank.[2] According to plaintiff, during that lunch Castro told plaintiff that she (Castro) believed there was a serious problem with plaintiff's portfolio. Plaintiff testified at her deposition that she (plaintiff) also believed there was a serious problem with how her account was being handled. Lyon Decl. I Ex. A. at 165:2-11. On July 23, 2002, a lawyer for plaintiff sent Trainer Wortham a letter threatening legal action for the mishandling of her account. Lyon Decl. I Ex. O.

In her complaint, Betz alleges that she did not discover until March 2002 that defendants had invested her funds in unsuitable investments, that it was not her best interest to trade in an unsuitable margin account, and that defendants had made material misrepresentations and omissions. *Id.* at ¶ 25. In the complaint, plaintiff alleges that "just prior to March, 2002" Carmen Castro advised her that nothing was wrong with her account and that defendant Charles Moore, president of Trainer Wortham and First Republic Bank, would come meet with her and see that her account was replenished. Plaintiff alleges that these statements were intended to lull her into a false sense of security and discourage her from taking action. *Id.*

---

[2] Plaintiff admits that this lunch took place in March 2001. *See* Lyon Decl. I Ex. A at 167:7-168:7.

Plaintiff filed this action in July 2003. On February 2, 2004, this Court granted a motion by defendants to dismiss the First Amended Complaint with leave to amend; plaintiff filed a Second Amended Complaint on February 20, 2004.

Plaintiff brings a federal claim under Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. 240.10b-5, and state law claims for breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and unfair business practices in violation of California Business and Professions Code § 17200. She seeks at least $2 million in damages and $5 million in punitive damages.

Now before the Court are: (1) plaintiff's motion for partial summary judgment and (2) defendants' motion for summary judgment.

LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party, however, has no burden to negate or disprove matters on which the non-moving party will have the burden of proof at

trial. The moving party need only point out to the Court that there is an absence of evidence to support the non-moving party's case. *See id.* at 325.

The burden then shifts to the non-moving party to "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). To carry this burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

In deciding a motion for summary judgment, the evidence is viewed in the light most favorable to the non-moving party, and all justifiable inferences are to be drawn in its favor. *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ruling on a motion for summary judgment." *Id.*

DISCUSSION

I. Plaintiff's Motion for Partial Summary Judgment

Plaintiff seeks summary judgment on the limited factual issue of whether plaintiff could withdraw $15,000 per month from her investment and not deplete the principal. Plaintiff maintains that defendant Como and Carmen Castro of First

Republic Bank knew that she had $2.2 million to invest from the sale of her home; that plaintiff was dependent upon the long-term income from this amount and unsophisticated in financial matters; and that she would only invest her money if she could get $15,000 per month without depleting principal. She contends that the representations made to her – that she could withdraw that amount without depleting her principal investment – were and are false, and that she is entitled to partial summary judgment on the issue of liability as a result. For this contention, plaintiff relies on (1) the deposition testimony of Charles Moore, the president of defendant Trainer Wortham, (2) the deposition testimony of defendant David Como, the investment representative who handled her account initially, and (3) her own declaration.[3]

---

[3] One of the spreadsheets shown to plaintiff suggested that, if plaintiff invested $2.5 million in a 100% equity portfolio, she could withdraw $13,000 per month and still achieve an increase in portfolio value up to $6,376,092 after ten years. Lyon Decl. I, Ex. G at P 072. At deposition Charles Moore testified that "there is no way that someone can be 100% in equities and live off the income and preserve the principal, this doesn't make sense." Pl.'s Mot., Ex. B at X. Como testified that "it is obvious from all the schedules that, under any scenario, the amount of money needed couldn't be produced on a yield basis." *Id.*, Ex. C at 37:10-12. In Betz's declaration in support of her Opposition brief, she states that she "did not know until the [Moore and Como] depositions . . . that the representations were in fact false in that in said depositions [they] admitted that the aforesaid investment plan implemented by Trainer Wortham and David Como

(footnote continued...)

Defendants argue that plaintiff's motion rests on the premise that the challenged representation was actually made by defendants. Whether defendants made this oral representation is a hotly disputed fact, which defendant Como and Carmen Castro deny; in fact, Como, Castro, and Robert Vile state that they warned plaintiff that her ability to make the monthly withdrawals would depend on the stock market. Defendants also contend they use the term "principal" differently from plaintiff, and under their definition, Como and Moore did not testify that "it is impossible to generate $15,000 per month without depleting the original investment." Plaintiff uses "principal" to refer to her original $2.2 million investment. Defendants define the term as the initial investment and any growth. Applying their definition, defendants argue that when Como and Moore testified that principal would have been used to cover plaintiff's $15,000 monthly withdrawals, they meant this augmented amount, and that the growth conceivably could

---

(continued from previous page)
could not and would not in fact pay me approximately $15,000.00 per month without depleting the principal." Betz Decl. in Support of Opp'n ¶ 7. Defendants have raised objections to various portions of both the Betz Declaration in Support of Plaintiff's Opposition and the Betz Declaration in Support of Plaintiff's Motion for Partial Summary Judgment. Because the Court does not rely on the challenged statements in deciding these motions, it does not reach the merits of these objections.

have been great enough to cover a $15,000 monthly payment.[4]

According to defendants, plaintiff ultimately took the position that principal means original investment on January 24, 2005, after reviewing her own deposition testimony and that of Como and Moore, in order to fashion a coherent theory of her case. They submit the declarations of Como and Moore to further explain the meaning of their testimony. Como testified that a $2.5 million portfolio could not generate $13,000 per month from its "yield" alone and that some portion of the "principal" would have to be used; Moore testified that a $2.0 million portfolio could not generate $15,000 per month from "yield" and that some portion of the "principal" would have to be used. Decl. of Alexander Lyon ("Lyon Decl.") II, Ex. B at 33:3-37:23; Ex. I at 84:6-85:3. Both declarations state that "yield" is dividends payable on an investment and "principal" means the original

---

[4] Defendants also contend that plaintiff's motion is defective because it asks for summary judgment on the "issue of defendants' liability" but then seeks a narrower summary adjudication of the fact that defendants knew that plaintiff could not withdraw $15,000 per month without depleting principal. It is procedurally proper for a party to seek summary adjudication of fewer than all of the claims or issues presented in a case, including facts that the party considers undisputed. As plaintiff points out in her reply, she is not seeking to establish all elements of her claims, but rather to obtain a ruling on this factual issue. The Court finds that her motion is proper in this respect.

investment and any growth or capital appreciation. Como Decl. ¶ 7; Moore Decl. ¶ 2. Defendants argue that, based on these clarifications, Como and Moore's testimony established only that the monthly payments could not come solely from dividends, but would have to also come from the original investment and its growth – although they might come solely from the investment's growth if growth in the stock market was strong.

The Court concludes that plaintiff is not entitled to summary judgment on the issue of whether defendants knew that she could not withdraw $15,000 per month without depleting "principal" because plaintiff has testified inconsistently about the meaning of the term "principal," sometimes using the word to refer to her original investment only, and other times using it to refer to both the original investment and any growth, and plaintiff and defendants offer different definitions of the term, leaving a dispute of fact about what defendants' testimony means. Plaintiff argues that defendants are simply trying to create confusion by challenging her use of the term "principal," and that they similarly sought to confuse her during her deposition. The Court concludes that the confusion over the term has not simply been generated by defendants but in fact presents a genuine issue of material fact in the case, precluding summary judgment on the issue as defined by plaintiff.

Accordingly, plaintiff's motion for partial summary judgment is DENIED.

II. Defendants' Motion for Summary Judgment

Defendants bring their motion for summary judgment on grounds that the various statutes of limitations bar each of plaintiff's claims. Specifically, they contend that (1) plaintiff's cause of action under Section 10(b) is time-barred because plaintiff had actual notice of her claims more than two years before her July 2003 complaint; (2) that her state law claims for breach of fiduciary duty, breach of the implied covenant of good faith, and negligent misrepresentation are barred by Cal. Code Civ. Proc. § 339(1)'s two-year statute of limitations; and (3) that her cause of action under Cal. Bus. & Prof. Code § 17200 is barred by the four-year statute of limitations.

A. Two-year statute of limitations for Section 10(b) claim

Plaintiff filed her complaint on July 11, 2003. According to defendants, plaintiff had received documents well before July 2001 contradicting the alleged misrepresentations, and these documents gave her inquiry notice of her claim. Under 28 U.S.C. § 1658(b), the limitations period for Section 10(b) claims is the earlier of two years after discovery of the facts constituting the violation or five years after the violation occurs. Defendants contend that the two-year statute applies and that plaintiff had inquiry notice of her claim as of February 2000, or at least by March 2001, when she personally believed her account had been mishandled.

Inquiry notice "is triggered by financial, legal or other data available to plaintiff providing . . . sufficient storm warnings to alert a reasonable person to the [probability] that there were either misleading statements or significant omissions involved in the sale of the [securities]. Once such storm warnings appear, plaintiffs must exhibit reasonable diligence in investigating the possibility that they have been defrauded." *Addeo v. Braver*, 956 F. Supp. 443, 449 (S.D.N.Y. 1997); *see also Bull v. Chandler*, *Sterlin v. Biomune Sys.*, Inc., 154 F.3d 1191, 1202 (10th Cir. 1998). The Court must evaluate (1) whether there were apparent storm warnings, and (2) whether the investor exercised reasonable diligence in investigating the possible fraud.

Viewing the facts in the light most favorable to plaintiff, as it must when considering defendants' motion for summary judgment, the Court takes all allegations as true and assumes that defendants made the oral representation to plaintiff that she could withdraw $15,000 per month without depleting principal. In addition, the Court notes that the spreadsheets presented to plaintiff during her initial meetings with defendants (Lyon Decl. I Ex. G) were wildly optimistic and potentially confusing. Nonetheless, the record reflects "storm warnings" on plaintiff's Section 10(b) claim before March 2001. Inquiry notice was initiated in February 2000, when plaintiff received the first of thirty account statements between that month and July 2001 showing that her portfolio had declined below the value of her original $2.2 million investment. These account statements directly

contradicted the alleged oral representation made by defendants. *See Addeo*, 956 F. Supp. at 449 (finding inquiry notice when plaintiffs received prospectuses reflecting later maturity dates for bonds than broker had promised); *Bull v. Chandler*, 1992 WL 103686 (N.D. Cal. 1992) at *4 (finding notice where plaintiff received prospectuses warning of high risk, contrary to broker's representation that investments were suitable for his objective of low-risk investing); *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 347-48 (2d Cir. 1993) (finding notice when plaintiff received prospectuses disclosing high-risk nature of investments, despite plaintiff's lack of sophistication in finance). If the alleged oral agreement was that plaintiff could withdraw $15,000 per month without depleting original principal, then the first statement reflecting an amount lower than her initial investment of $2.2 million contradicted this promise. The continued decline of this amount over the course of 2000, culminating in a balance of $848,000 in March 2001, was sufficient to constitute a storm warning. Accordingly, a reasonable investor of ordinary intelligence would have undertaken an investigation.

Second, the Court must consider whether plaintiff exercised reasonable diligence in investigating a possible fraud. Here, plaintiff called defendant Robert Vile in May 2000 to express concern about the fact that her portfolio had fallen below the original investment, and she did so again in January 2001. Lyon Decl. I, Ex. A at 100:22-101:20; 119:19-120:10. Plaintiff also testified at her deposition that in March 2001, Carmen Castro told

her that there was a "serious problem" with the way her account had been handled. Plaintiff contends that, given her lack of sophistication as an investor, there is a genuine issue of material fact regarding the issue of inquiry notice because assurances given by Como and Vile, First Republic Bank's Carmen Castro, and Charles Moore lulled her into a false sense of security and prevented her from discovering the fraud until March 2002. Specifically, she offers evidence that, when her portfolio dropped to approximately $1.9 million in July 2000, Robert Vile told her "it would be back up in no time"; that when she expressed concern about her portfolio in March of 2001, Vile told her that "within a year or less the market would recover" and her account would go back up; that, despite Carmen Castro's statements in March 2001 that there was a serious problem with her account, Castro subsequently reassured plaintiff that her portfolio would be reviewed by Charles Moore; and that, after Moore's meeting with plaintiff, Castro told her that Moore was meeting with the company's attorneys and asked plaintiff to be patient and to not take legal action. *See* Pl.'s Opp'n, Ex. 1 at 151:6-152:11; Ex. 2 at ¶ 4.

In the Ninth Circuit, an investor may not rely on a broker's assurances where she has constructive notice of fraud. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987); *see Bull v. Chandler*, 1992 WL 103686 at *5. Plaintiff cites *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436-37 (9th Cir. 1984), for the proposition that the reassuring statements of an investment advisor to a naïve investor may create a

genuine issue of material fact. The Court of Appeals has expressly held, however, that *Vucinich* does not compel denial of summary judgment where a plaintiff is a sophisticated investor who monitors his or her monthly statements. *See Davis v. Birr, Wilson & Co.*, 839 F.2d 1369, 1370 (9th Cir. 1988).

Viewing the evidence in the light most favorable to plaintiff, the Court concludes that defendants' reassurances are insufficient to create an issue of material fact. By March 2001, plaintiff was in possession of many account statements revealing the alleged fraud. *See Bull*, 1992 WL 103686 at *5 (N.D. Cal. Mar. 12, 1992); *Dodds*, 12 F.3d at 351; *Addeo*, 956 F. Supp. at 451-52. She closely monitored her account between February 2000 and March 2001, and by March 2001 she believed that her account had been mishandled. Robert Vile's assurances in 2000 and 2001 did not toll the statute of limitations, and Carmen Castro's later statements and promise that Charles Moore would review plaintiff's account did not prevent the cause of action from accruing at least by March 2001.

Accordingly, the Court finds that plaintiff was on notice of her Section 10(b) claim well before July 2001. Defendants' motion for summary judgment is GRANTED as to this claim.

B. Two-year statute of limitations for breach of fiduciary duty, breach of implied covenant of good faith, and negligent misrepresentation claims

Defendants argue that because defendants' alleged agreement with her was an oral (rather than written) agreement, plaintiff's claims for breach of the implied covenant of good faith and negligent misrepresentation are subject to the two-year statute of limitations in Cal. Code Civ. Proc. § 339(1), which governs oral contracts. In addition, they contend that the same two-year statute of limitations applies to the breach of fiduciary claim because the breach of this oral agreement is the gravamen of her complaint. Plaintiff contends that, because she signed a written management agreement with Trainer Wortham on June 7, 1999, the statute of limitations is four years under C.C.P. § 337, which governs written contracts. In addition, she argues that the gravamen of her breach of fiduciary duty claim is not negligence and breach of an oral agreement, but rather fraudulent and reckless conduct in placing her in unsuitable investments and failing to make proper disclosures, and that this claim should be governed either by the general four-year statute of limitations for breach of fiduciary, *see* C.C.P. § 343, or by the three-year statute of limitations for fraud claims. *See* C.C.P. § 338(d). Finally, she contends that there is an issue of fact regarding whether the two-year statute governing the negligent misrepresentation claim was tolled by defendants' reassurances and promises to replenish her account.

1. Implied covenant of good faith claim

Plaintiff contends that the four-year statute of limitations for claims arising out of written contracts applies to this claim rather than the two-year limitations period for breaches of oral agreements. The Court agrees with defendants that plaintiff's fundamental allegation is a breach of an oral guarantee made to her about the performance of her investment account. The two-year statute of limitations applies, and bars this claim.

Summary judgment is GRANTED as to this claim.

2. Negligent misrepresentation claim

For the reasons stated above, the Court finds that the two-year statute of limitations in C.C.P. § 337(1) applies and bars this claim. The remaining issue is whether defendants' reassurances tolled the statute. As discussed regarding plaintiff's Section 10(b) claim, once a plaintiff is on notice of possible fraud by her investment broker, she may not rely on representations by that broker. *See Bull v. Chandler*, 1992 WL 103686 at *5; *Dodds*, 12 F.3d at 351; *Addeo*, 956 F. Supp. at 451-52. Because plaintiff was in possession of thirty account statements, beginning in February 2000, directly contradicting the alleged promise made by defendants, any reassurances by them did not toll the limitations period.

Accordingly, plaintiff's negligent misrepresentation claim is untimely, and summary judgment is GRANTED as to it.

3. Breach of fiduciary duty claim

The parties dispute whether the gravamen of plaintiff's breach of fiduciary claim is a breach of an oral agreement and professional negligence (defendants; 2-year statute) or fraudulent and reckless conduct by defendants in investing plaintiff's monies in unsuitable investments and failing to make proper disclosures (plaintiff; 3-year statute for fraud claims or 4-year statute for general breach of fiduciary duty claims).

Based on the allegations in plaintiff's complaint, the Court concludes that the gravamen of this claim is negligence rather than fraud. Specifically, she alleges that defendants owed her a duty to "manage [her] account in a manner that was consistent with [her] financial data, financial needs, and [her] long-term objectives and, further, consistent with plaintiff's age, her future retirement date and her total assets," and that they breached this duty by "not fully investigating their suggested plan of investments to ensure its suitability for plaintiff, for not allocating her investment in a manner that was consistent with recognized guidelines for an investor of plaintiff's age, financial condition, financial needs and plaintiff's inexperience in investment decisions . . ." Second Am. Compl. ¶¶ 30-31. Consequently, the two-year statute of limitations applies, and this claim is time-barred.

The Court GRANTS defendants' motion for summary judgment as to this claim.

C. Four-year statute of limitations for Section 17200 claim

Plaintiff's Section 17200 claim is based on all of her allegations, including defendants' alleged breach of an oral agreement with her and defendants' failure to adhere to professional standards in choosing her investments. The only customer-wide practice alleged in the complaint is the payment of a referral fee by defendant Trainer Wortham to First Republic Bank.

Under Cal. Bus. & Prof. Code § 17208, Section 17200 claims are subject to a four-year limitations period that begins when a claim accrues, not when the plaintiff discovers the violation. *See Karl Storz Endoscopy-America, Inc. v. Surgical Technologies, Inc.*, 285 F.3d 848, 857 (9th Cir. 2002) (under § 17208, the discovery rule does not apply). Based on *Suh v. Yang*, 987 F. Supp. 783, 795-96 (N.D. Cal. 1997), plaintiff argues that where the violation involves multiple or continuous acts, some of which occurred within the violations period, the statute does not bar a 17200 claim. Defendants contend that Suh is not persuasive in this case because the plaintiff in that case was unable to prevent defendants' violation, while plaintiff here could have closed her account at any time.[5]

---

[5] Defendants also argue that plaintiff's Section 17200 claim is precluded by *Bowen v. Ziasun Tech., Inc.*, 116 Cal. App. 4th 777, 786 (2004), which holds that Section 17200 does not apply to securities transactions like the one presented here. Because the Court finds that this

(footnote continued...)

The Court agrees with defendants that plaintiff's Section 17200 claim accrued in June 1999, because that is when plaintiff signed the management agreement containing the objectionable referral fee, and when defendants made the alleged misrepresentation and provided plaintiff with the misleading spreadsheets. Accordingly, the claim is barred by the four-year statute of limitations.

Defendants' motion for summary judgment is GRANTED as to this claim.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby DENIES plaintiff's motion for partial summary judgment and GRANTS defendants' motion for summary judgment. [Docket ## 44, 48]

IT IS SO ORDERED.

Dated: April 5, 2005

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

(continued from previous page)
claim is barred by the statute of limitations, it does not address this issue.

PRINTINGHOUSE PRESS, LTD
10 EAST 39TH STREET, NEW YORK, NY 10016 (212) 719 0990
Printed on Recycled Paper

No. 07-1489

FILED
JUN 27 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,

Petitioners,

v.

HEIDE BETZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THEODORE F. SCHWARTZ
230 South Bemiston Ave.
Suite 1010
St. Louis, Missouri 63105
(314) 863-4654

DANIEL R. SCHRAMM
TIMOTHY E. HAYES & ASSOC., L.C.
231 South Bemiston Ave.
Suite 950
St. Louis, Missouri 63105
(314) 726-6767

JOSEPH M. ALIOTO
Counsel of Record
555 California Street
Suite 3160
San Francisco,
California 94104
(415) 434-8900

Counsel for Respondent

QUESTIONS PRESENTED

Respondent Heide Betz charged Petitioners Trainer Wortham & Company, Inc., David P. Como, First Republic Bank and Robert Vile (collectively, the "defendants") with federal securities fraud. The defendants promised Betz a generous rate of return without touching principal. (ER 300, 677) The defendants then invested $2.2 million of Betz's life savings in unsuitable stocks, mostly in the volatile technology and telecommunications industries. (ER 44, 46) When periodic statements showed a decline in Betz's account balance, the defendants initially gave her false reassurances that the losses were temporary and that her stocks would recover. (ER 693-94, 696-99) Later, the defendants gave Betz more specific assurances that the president of Trainer Wortham would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." (ER 707) Betz filed suit just over one year after learning that the defendants' promises were false. (ER 1) The questions presented are:

1. Did the Court of Appeals err in following the majority of circuits in concluding that the statute of limitations began to run, not the moment the decline in Betz's account balance created a mere possibility of fraud (as one circuit has suggested), but when Betz became aware of facts sufficiently probative of fraud to put her on inquiry notice, and then, only when Betz, in the exercise of reasonable diligence, should have discovered the facts constituting the fraud?

2. In evaluating the second prong of its inquiry notice plus reasonable diligence test, did the Court of Appeals err in holding Betz created a genuine issue of material fact sufficient to defeat summary judgment by showing the defendants made specific assurances that could have delayed a reasonable investor in Betz's position from discovering the fraud?

TABLE OF CONTENTS

Questions Presented i

Table of Contents iii

Table of Authorities v

Introduction 1

Statement of the Case 2

Facts 2

The District Court grants summary judgment 6

The Ninth Circuit reverses 7

Reasons for Denying the Writ 8

I. THE DEFENDANTS, LIKE THE DISSENTING CHIEF JUDGE, MISSTATE THE LAW BY DESCRIBING THE NINTH CIRCUIT DECISION AS "IN LEFT FIELD." 8

A. The Ninth Circuit followed the majority of circuits in adopting its inquiry notice plus reasonable diligence test 9

1. The defendants exaggerate when they call the circuits "fractured" over inquiry notice 11

2. The Ninth Circuit did not depart from existing law in concluding that the decline in Betz's account balance was insufficient to trigger inquiry notice... 13

B. The Ninth Circuit properly applied the second prong of its inquiry notice plus reasonable diligence test in considering the defendants' specific assurances 19

1. At the second stage of its inquiry, the Ninth Circuit could consider whether the defendants gave specific assurances to Betz which would have delayed discovery of the fraud by a reasonable investor in her position 20

2. The jury is better suited to determine what a reasonable investor should have known in Betz's particular circumstances 24

II. BECAUSE THE NINTH CIRCUIT DECISION IS CONSISTENT WITH THE INQUIRY NOTICE RULES APPLIED BY MOST COURTS, THIS APPEAL PRESENTS NO ISSUE OF PROFOUND NATIONAL IMPORTANCE..... 25

Conclusion 28

TABLE OF AUTHORITIES

Page

Case Law

Agency Holding Corporation v. Malley-Duff & Associates, Inc., 483 U.S. 143 (19987) 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 2, 19

Betz v. Trainer Wortham & Company, Inc., 2007 WL 1494017, 236 Fed.Appx. 253 (9th Cir. May 11, 2007)(unpublished) 6

Brumbaugh v. Princeton Partners, 985 F.2d 157 (4th Cir. 1993) 17

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 10

Caviness v. Derand Res. Corp., 983 F.2d 1295 (4th Cir. 1993) 10

Cooperativa DeAhorro Y. Credito Aquada v. Kidder, Peabody & Company, 129 F.3d 222 (1st Cir. 1997) 17, 21

DaimlerChrysler Ag Securities Litigation, 269 F.Supp. 2d 508, n. 5 (D.Del. 2003) 15, 23

DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209 (3rd Cir. 2007) 18

DeMarco v. Lehman Brothers, Inc., 309 F.Supp.2d 631 (S.D.N.Y. 2004) 15

Dodds v. Cigna Sec., Inc., 12 F.3d 346 (2d Cir. 1993) 17

Dura Pharmaceuticals, Inc. v. Broudo,, 544 U.S. 336 (2005) 27

Franze v. Equitable Assurance, 296 F.3d 1250 (11th Cir. 2002) 12

Fujisawa Pharm. Co. v. Kapoor, Witter Reynolds, Inc., 115 F.3d 1332 (7th Cir. 1997) 14, 17

Gray v. First Winthrop Corp., 82 F.3d 877 (9th Cir. 1996) 16, 24

Great Rivers Coop. v. Farmland Indus., Inc., 120-F.3d 893 (8th Cir. 1997) 9

In re Exxon Mobil Corp. Securities Litigation, 387 F.Supp.2d 407 (D.N.J. 2005) 22

In re Micron Technologies, Inc. Securities Litigation, 2007 WL 576468 (D. Idaho Feb. 21, 2007) (unpublished) 15

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988) 10

Jones v. R.R. Donnelley & Sons Company, 541 U.S. 369 (2004) 26

LaGrasta v. First Union Securities, 358 F.3d 840 (11th Cir. 2004) 16

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 1, 10, 26

Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997) 15

LC Capital Partners, LP v. Frontier Insurance Group, Inc., 318 F.3d 148 (2nd Cir. 2003) 13, 22, 23

Levitt v. Bear Stearns & Co., 340 F.3d 94 (2nd Cir. 2003) 12, 15

Livid Holdings, Ltd. v. Salomon Smith Barney, Inc., 416 F.3d 940 (9th Cir. 2005) 16

Marks v. CDW Computer Centers, Inc., 122 F. 3d 363 (7th Cir. 1997) 12, 14, 17

Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3rd Cir. 2001) 13, 21

McCoy v. Goldberg, 748 F.Supp. 146 (S.D.N.Y. 1990) 23

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982) 11

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 26

Milman v Box Hill Systems Corp., 72 F.Supp.2d 220(S.D.N.Y. 1999) 22

Motorola Securities Litigation, 505 F. Supp.2d 501 (N.D.Ill. 2007) 15, 17

New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 496 (6th Cir. 2003) 9, 12, 18

Newman v. Warnaco Group, Inc., 335 F.3d 187 (2nd Cir. 2003) 15

Richey v. Horner, 244 F.3d 635 (8th Cir. 2001) 12, 17, 21

SEC v. Seaboard Corp., 677 F.2d 1301 (9th Cir. 1982) 20, 21, 24

Sterlin v. Biomune Systems, 154 F.3d 1191 (10th Cir. 1998) 9, 12, 14

Stoneridge Investments Partners, LLC v. Scientific-Atlanta, Inc., 128 S.Ct. 761 (2008) 26

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499 (2007) 26

Theodarous v. Fong, 256 F.3d 1219 (11th Cir. 2001) 12

Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1992) 17

Vucunich v. Paine, Webber, Jackson & Curtis, Inc., 739 F.2d 1434 (9th Cir. 1984) 24

Whirlpool Fin. Corp. v. GN Holdings, 67 F.3d 605 (7th Cir. 1995) 17, 22

Wyser-Pratte Management Co., Inc. v. Telxon Corporation, 413 F.3d 553 (6th 2005) 18

Young v. Lepone, 305 F.3d 1 (1st Cir. 1st Cir. 2002) 9, 12

Statutes

15 U.S.C. §78j(b) 6

15 U.S.C. §78i(e) 10

28 U.S.C. §1658(b) 6, 10, 27

Sarbanes-Oxley Act of 2002, Pub.L.No. 107-204, §804, 116 Stat. 745 (2002) 27

Rules

17 C.F.R. §240.10b-5. 6

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The defendants, like Chief Judge Kozinski in his dissent, misstate the law in describing the Ninth Circuit decision as "in left field." (Petition, p. 3, *citing* App. 28a.) And the defendants exaggerate when they call the Courts of Appeals "fractured" on the inquiry notice issue. (Petition, p. 15)

Almost all the circuits now follow some form of inquiry notice. This Court left it to the lower courts to sort out the inquiry notice question in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991). Congress showed its approval of prevailing case law on this point when it enacted 28 U.S.C. §1658(b). Congress extended the limitations period for §10(b) claims, but made no substantive change in the "discovery" language previously in effect under 15 U.S.C. §78i(e).

The defendants identify only two approaches to inquiry notice that arguably could make a difference here: (1) the Eleventh Circuit approach suggesting that inquiry notice could have been triggered the moment Betz learned facts raising the mere possibility of fraud; and (2) the consensus of most other circuits that would give Betz the chance to conduct some reasonable inquiry to discover the fraud. The Ninth Circuit cannot be faulted for following the consensus of most courts on this issue. The defendants, like Judge Kozinski, wrongly accuse the Ninth Circuit of standing alone in imposing an inquiry notice standard that would require Betz to be aware of facts sufficiently probative of fraud,

including scienter. (*See,* Petition, p. 20; App. 33a.) The defendants ignore an emerging body of federal appellate and district courts sharing this view.

The record here shows that Betz made inquiries about the decline of her account balance, but was thwarted in her ability to discover the fraud by the defendants' specific assurances. (ER 693-94, 696-99, 707-09) The defendants bear a considerable burden, at the summary judgment stage, of showing that Betz's claim is time-barred. The Ninth Circuit found a genuine issue sufficient to defeat summary judgment when the defendants made specific assurances that could have delayed a reasonable investor in Betz's position from discovering the fraud. (App. 22a) Because the Ninth Circuit applied prevailing inquiry notice standards in reaching its conclusion, this appeal presents no need for Supreme Court intervention.

STATEMENT OF THE CASE

Facts

The defendants misstate the facts in describing Betz as "a 25-year veteran of the business world." (Petition, p. 5) Because this is an appeal of summary judgment, this Court is obligated to view the evidence in the light most favorable to Betz as the non-moving party and to draw all justifiable inference in her favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

Judged by this standard, this Court must accept Betz's claim that she is a retired art dealer, but she knew nothing about stocks and bonds and she only understood the "bottom line," or total balance of

her account. (ER 666, 691, 706) Betz could not explain what a "stock" is, nor what a "bond" is. (ER 691, 299-300) Because of her naiveté on these kinds of issues, Betz testified that she relied solely on the defendants for advice. (ER 298) The Ninth Circuit did not focus on Betz's naiveté in its final decision.[1] But by shifting emphasis, the Ninth Circuit gave the defendants no license to misstate the facts.

In 1999, Betz sold her house for $2.2 million. (ER 705) Betz was seeking a real estate loan to buy a co-op, and met with Carmen Castro of First Republic Bank for this purpose. (ER 705) Castro introduced Betz to David Como of Trainer Wortham, a subsidiary of First Republic. (ER 705) Como and Castro recommended that Betz invest the proceeds from the sale of her house with Trainer Wortham. (ER 671) Betz told Como and Castro that the $2.2 million was all the cash she had and that she sold her home to generate income for her living expenses. (ER 670, 705) Como and Castro assured Betz that, if she invested her $2.2 million with Trainer Wortham, she could withdraw $15,000 per month from her portfolio without touching principal. (ER 300) Betz was to use at least half of this monthly income to pay off a First Republic real estate loan that Betz obtained through Castro. (ER 40) Como also produced charts to suggest that the principal would grow to $2.7 in one year and $4 million in five years. (ER 668)

In June, 1999, Betz entered into an oral agreement with Como, giving the defendants control over the $2.2 million. (ER 705) Betz and Como agreed that Como would invest Betz's money "in such

---

[1] In applying its objective inquiry notice plus reasonable diligence test, the Ninth Circuit amended its prior opinions by removing all references to Betz's lack of sophistication. (*See*, e.g., App 57a, at n.4; 84a-85a.)

a fashion that [Betz] would receive $15,000 a month from the profit of the investment and that he would not touch principal." (ER 677)

At the time of the oral agreement, Betz also signed a written "Letter of Understanding for Portfolio Management and Administrative Services" and "Investment Management Agreement." (App. 4a) The defendants correctly state that these written agreements contained boilerplate disclosures about the risk of investment and the potential loss of principal. (Petition, pp. 6-7; ER 380-84) But the defendants fail to mention that the agreements contained no "integration" or "merger" clauses and made no reference to Como's oral promises. (App. 4a-5a; ER 380-84)

After Betz opened her account with the defendants, she began receiving monthly account statements. (ER 691) Betz experienced growth in her account over the first six months. (App. 91a) But by February 2000, Betz received her first statement showing an account value below $2.2 million. (App. 5a) Betz continued to receive periodic account statements showing that the account value had dropped below the amount of her initial investment. The defendants admit that Betz raised inquiries when the account balance dropped to $1.8 million, and later, to $1.3 million. (Petition, pp. 7-8, citing ER 317-18, 328-33, 373) Throughout this period, Como and Robert Vile, another Trainer Wortham investment advisor, assured Betz that the losses were temporary and that the stocks would recover. (ER 693, 697-99, 707) By March 2001, Betz's account balance had dropped to $848,000. (App. 5a)

When she received her March account statement, Betz spoke with Vile to express her

dismay that the value of her portfolio had dropped to $848,000. (ER 706-07) Vile told Betz that the declining balance was attributable to her monthly $15,000 withdrawals that the defendants originally promised. (ER 681) But Vile assured Betz that "we know what we are doing. This is temporary. We're going to—we're watching your account. And it's temporary. We're taking care of everything. Don't worry about it." (ER 696) Vile gave Betz specific assurance that "within a year or less the market would recover and [her] account would be back to $2.2 million." (ER 707) Como also assured Betz that "there was nothing wrong with the portfolio and that the value would be back up very soon." (ER 693, 707) Castro made similar assurances that Vile and Como "knew what they were doing" and that Betz "should not worry about [her] portfolio." (ER 707)

When the account balance failed to recover, Betz met with Castro later in the spring of 2001. For the first time, Castro acknowledged "a serious problem" with the way Betz's portfolio had been managed. (ER 707) But Castro assured Betz that the president of Trainer Wortham, Charles Moore, would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships." (ER 707) Despite acknowledging a problem with the account, Castro never suggested that Como or Vile had deliberately lied to Betz.

The defendants strung Betz along for another year with reassurances until Moore met personally with Betz in May 2002. Shortly after this meeting, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be

patient with them and not take any legal action." (App 5a; ER 707) But the next month, in June 2002, Castro told Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account. (ER 707)

Moore later testified that a portfolio of about $2 million invested in equities would earn about two percent in 1999—about $40,000 per year. (ER 717) Moore admitted there was no way $2 million could earn $15,000 per month: "This doesn't make sense." (ER 717) Como made a similar admission in his testimony. (ER 719, 723)

Just over one year after Betz discovered the fraud, that is, on July 11, 2003, Betz filed her lawsuit. (ER 1) Betz charged the defendants with securities fraud in violation of §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. §240.10b-5. (App. 6a) Betz also raised pendent state law claims for breach of contract, negligent misrepresentation, breach of fiduciary duty, and violation of the Cal. Bus. & Prof. Code §17200. (*See*, ER 53-59)[2]

The District Court grants summary judgment.

The defendants moved for summary judgment based on the two-year statute of limitations in 28 U.S.C. §1658(b). The District Court granted

---

[2] The District Court granted summary judgment to the defendants on Betz's state law claims. But in an unpublished Memorandum Opinion, the Ninth Circuit reversed. *See, Betz v Trainer Wortham & Company, Inc.*, 2007 WL 1494018, 236 Fed.Appx. 253 (9th Cir. May 11, 2007) (unpublished). The defendants are not challenging this aspect of the Ninth Circuit decision.

summary judgment, holding that Betz's federal securities claim was time-barred. (App. 103a) The District Court concluded that the decline in Betz's account balance was sufficient to put Betz on inquiry notice by no later than March 2001. (App. 101a) And the District Court rejected Betz's argument that the defendants' reassurances created a genuine issue of material fact. (App. 103a)

The Ninth Circuit reverses.

After making some amendments to its opinion, the Ninth Circuit issued its final decision reversing the judgment of the District Court. (App. 23a) The Ninth Circuit joined ten of the other circuits in holding that inquiry notice could start the running of the limitations period for securities fraud. (App. 11a) The Ninth Circuit then adopted the inquiry notice plus reasonable diligence test used by the Tenth Circuit. (App. 15a) Under the first prong of this test, the court must determine if the plaintiff is aware of facts sufficiently probative of fraud--that is, sufficiently advanced beyond the stage of mere suspicion--to put the plaintiff on inquiry notice. (App. 16a) Once the plaintiff is on inquiry notice, the Ninth Circuit asks "when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." (App. 16a) The Ninth Circuit holds that the answer to the second question "tells us when the statute of limitations began to run." (App. 16a)

Applying its two-part test, the Ninth Circuit could not say, as a matter of law, that a reasonable investor in Betz's position should have discovered the facts giving rise to her claim before July 11, 2001. In

reaching this conclusion, the Ninth Circuit considered the "express assurances made by the [d]efendants that they would remedy the problems in the account, which may have lulled a reasonable investor into inaction." (App. 23a) The court held that a jury must determine "whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right." (App. 23a)

After making a few amendments in its final opinion, the Ninth Circuit panel voted to deny the defendants' petition for panel rehearing. (App. 27a) Because a majority of the active judges did not vote in favor of en banc consideration, the Ninth Circuit denied the defendants' petition for rehearing en banc. (App. 28a)

In strongly worded dissent, Chief Judge Kozinski (joined by Judges O'Scannlain and Bea) accused the court of being at odds with ten other circuits. (App. 28a) The defendants rely heavily on Judge Kozinski's dissent as the basis for their Petition.

REASONS FOR DENYING THE WRIT

I. THE DEFENDANTS, LIKE THE DISSENTING CHIEF JUDGE, MISSTATE THE LAW BY DESCRIBING THE NINTH CIRCUIT DECISION AS "IN LEFT FIELD."

The defendants paint a false picture of the Ninth Circuit staking out a radically different position on inquiry notice that is at odds with the other hopelessly fractured circuits. To support this

picture, the defendants employ Judge Kozinski's rhetorical excess in describing the Ninth Circuit decision as "in left field," or at odds with any other court "in the known universe." (Petition, p. 3, *citing* 28a, 31a.) But on closer examination, the defendants' argument collapses. Most of the circuits have now reached a general consensus on inquiry notice issues. And the Ninth Circuit decision in the *Betz* appeal is consistent with the prevailing view.

A. The Ninth Circuit followed the majority of circuits in adopting its inquiry notice plus reasonable diligence test.

The defendants and Judge Kozinski are wrong when they accuse the Ninth Circuit of being at odds with all other circuits. The Ninth Circuit has joined ten of those circuits in holding that inquiry notice can start the running of the limitations period for federal securities fraud under §10(b). (App. 11a-13a) The defendants admit that a majority of circuits follow some form of the Ninth Circuit's inquiry notice plus reasonable diligence test. (Petition, pp. 16-17) Like the majority, the Ninth Circuit holds that the clock does not start to run until (1) the plaintiff is on inquiry notice; and (2) the plaintiff, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.[3] (App. 16a; Petition, p. 17)

---

[3] The defendants refer to the following cases for this majority view: *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201 (10th Cir. 1998), *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003); *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Great Rivers Coop. v. Farmland*

This Court left it to the lower courts to sort out the inquiry notice question in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). The defendants argue that *Lampf* underscores the critical need for nationwide uniformity. (Petition, p. 4, citing *Lampf*, 501 U.S. at 357.) The defendants' argument is misleading. This Court only was expressing its preference in *Lampf* for a uniform federal statute of limitations over multiple state statutes. *Id.* The Court selected the 1-year period after discovery and the 3-year period of repose contained in §9(e) of the 1934 Act, 15 U.S.C. 78i(e). *Id.* at 364, n. 9. The Court also determined that equitable tolling was inconsistent with the 1-year and 3-year structure of the federal statute. *Id.* at 363. Beyond that, this Court saw no need to dictate to the lower courts on how the 1-year discovery period under the federal statute was to be construed.

Congress showed its approval of prevailing case law on inquiry notice when it extended the statute of limitations in the Sarbanes-Oxley Act of 2002. Congress extended the limitations period to "2 years after discovery of the facts constituting the violation; or...5 years after such violation." 28 U.S.C.§1658(b). In adopting its inquiry notice standard, the Ninth Circuit observed that Congress opted for identical "discovery" language previously in effect under §9(e) of the 1934 Act. (App. 13a) This Court has instructed that it should assume that Congress is aware of prevailing case law and legislates in its light. (App. 13a, *citing Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) and

---

Indus., Inc., 120 F.3d 893, 896 (8th Cir. 1997); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1303 (4th Cir. 1993); *Jensen v. Snellings*, 841 F.2d 600, 606-07 (5th Cir. 1988).

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379 (1982).) By 2002, a growing majority of the lower federal courts were adopting an inquiry notice standard with some kind of reasonable diligence component. By choosing "discovery" language identical to §9(e), Congress implicitly approved this developing case law.

Both this Court and Congress have left it to the lower courts to develop inquiry notice standards. With the *Betz* decision, the Ninth Circuit has now joined ten of its sister circuits in recognizing inquiry notice. (11a-13a) The Ninth Circuit has sided with the majority in adopting its inquiry notice plus reasonable diligence test. (App. 16a; Petition, p. 17) Because the Ninth Circuit decision is consistent with the prevailing case law, the defendants have failed to show a compelling need for Supreme Court intervention.

1. The defendants exaggerate when they call the circuits "fractured" over inquiry notice.

The defendants misstate the law when they call the Courts of Appeals "fractured" in determining when the statute of limitations starts to run. (Petition, p. 15) The defendants run through four different circuit court approaches—and then, they characterize the Ninth Circuit decision as a fifth approach that "departs radically" from the others. (Petition, pp. 16-19) The defendants exaggerate the significance of this purported split among the circuits. Most of the nuanced distinctions drawn by the defendants would make little difference in how

the circuits would approach Betz's particular circumstances.

The defendants identify only two approaches to inquiry notice that arguably could make a difference here:

(1) the Eleventh Circuit approach suggesting that inquiry notice could have been triggered the moment Betz learned facts raising the mere *possibility* of fraud, *Theodarous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001) (clock runs when plaintiff learns facts "that would lead reasonable person *to begin* to investigate *possibility* of fraud"); *accord*, *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); and

(2) the consensus of most other circuits that would give Betz the chance to conduct some reasonable inquiry to discover the fraud. *See, e.g*, *Sterlin v. Biomune Sys.*, 154 F.3d at 1201 (securities case remanded to consider second prong of Tenth Circuit's inquiry notice plus reasonable diligence test), *New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d at 501 (Sixth Circuit rejected *Theodarous* in favor of inquiry notice plus reasonable diligence test); *Young v. Lepone*, 305 F.3d at 8 (First Circuit reversed dismissal because question of reasonable diligence was a jury question); *Ritchey v. Horner*, 244 F.3d 635, 639 (8th Cir. 2001) (Eighth Circuit deemed inquiry notice issues too fact intensive to resolve by summary judgment); *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 101 (2nd Cir. 2003) (Second Circuit reversed dismissal because of factual disputes over scope of plaintiffs' inquiry and whether reasonable inquiry would have revealed enough information to satisfy PSLRA pleading requirements); *Marks v. CDW Computer Centers*,

Inc., 122 F.3d 363, 370 (7th Cir. 1997) (Seventh Circuit reversed dismissal because defendants failed to show that reasonably prudent investor would have discovered fraud and brought suit within limitations period).

The defendants argue that the Second and Third Circuits have taken a different "hybrid" approach that depends on whether the plaintiff actually conducts an investigation. (Petition, p. 18, *citing LC Capital Partners LP v. Frontier Ins. Group*, 318 F.3d 148, 154 (2nd Cir. 2003); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252-55 (3rd Cir. 2001).) This is not a distinction that would make any difference in this appeal. The defendants admit that Betz made inquiries about the decline in her account balance. (Petition, pp. 7-8, *citing* ER 317-18, 328-33, 373.)

The Ninth Circuit cannot be faulted here for giving Betz a reasonable opportunity to discover the fraud. This approach is consistent with consensus of practically all but one of the circuits. This Court might have had some justification for granting a writ if Betz's appeal had arisen in the Eleventh Circuit and summary judgment were affirmed. But this appeal is not the proper vehicle for challenging the lone minority view of a different circuit.

2. The Ninth Circuit did not depart from existing law in concluding that the decline in Betz's account balance was insufficient to trigger inquiry notice.

The defendants incorrectly argue that the Ninth Circuit has defined inquiry notice differently

from all other circuits. The defendants express outrage with the Ninth Circuit's holding that inquiry notice was not triggered here until Betz discovered "evidence that the defendants had intentionally or deliberately and recklessly misled [her]." (Petition, p. 20, *citing* 20a.) The defendants quote Judge Kozinski's description of this need for evidence of scienter as an "oxymoronic rule." (Petition, p. 20, citing App. 31a) And paraphrasing Judge Kozinski, the defendants charge that "[t]he rule everywhere in the known universe—or at least everywhere else in the nation—is...that a plaintiff is obliged to inquire upon learning facts that raise the '*possibility* of a fraud.'" (Petition, p. 21, *citing Sterlin,* 154 F.3d at 1203.) By making this hyperbolic declaration, the defendants expose themselves to the risk being proven wrong.

The defendants ignore a growing body of federal appellate and district court decisions that support the Ninth Circuit's scienter holding. The defendants disparage the Ninth Circuit's reliance on *Fujisawa Pharm. Co. v. Kapoor, Witter, Reynolds, Inc.,* 115 F.3d 1332, 1335 (7th Cir. 1997). But the Seventh Circuit held unequivocally in *Fujisawa* that the facts constituting notice "must be sufficiently probative of fraud—sufficiently advanced beyond the state of mere suspicion, sufficiently confirmed or substantiated—not only to incite the victim to investigate but also to enable him to tie up any loose ends and complete the the investigation in time to file a timely suit." *Id.* The Seventh Circuit later reaffirmed this rule in *Marks v. CDW Computer Centers, Inc.,* 122 F.3d at 368. The Second Circuit agrees with the Seventh Circuit in holding that the fraud must be *probable*, not just possible. *See,*

Newman v. Warnaco Group, Inc., 335 F.3d 187, 193 (2nd Cir. 2003) (storm warnings must show probability of fraud).

Because the inquiry notice standard focuses on the probability and not just possibility of fraud, the Second and Seventh Circuits have held that the statute of limitations will not run unless the plaintiff knew or should have known of a *knowing* violation. *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 101 (2nd Cir. 2003) (question is whether reasonable inquiry would have revealed enough information to satisfy PSLRA pleading requirements); *Law v. Medco Research, Inc.*, 113 F.3d 781, 786 (7th Cir. 1997)(statute of limitations does not run until plaintiffs knew or should have known that defendants "made a representation that was knowingly false").

Federal district courts have followed the lead of the Second, Seventh, and now the Ninth Circuit, in holding that inquiry notice does not trigger the running of the statute of limitations before the plaintiff has notice that the defendants acted with the requisite scienter. *In re Micron Technologies, Inc. Securities Litigation*, 2007 WL 576468 (D.Idaho Feb. 21, 2007)*6; *DaimlerChrysler Ag Securities Litigation*, 269 F. Supp.2d 508, 517, n. 5 (D.Del. 2003); *DeMarco v. Lehman Brothers, Inc.*, 309 F.Supp.2d 631, 637 (S.D.N.Y. 2004); *In re Motorola Securities Litigation*, 505 F. Supp.2d 501, 526 (N.D.Ill. 2007). These district courts are certainly "within the known universe."

The defendants attack the Ninth Circuit's scienter holding because it undermines their theory that Betz was on inquiry notice the moment she lost money. (Petition, pp. 22-23, *quoting* Judge Kozinski,

at pp. 31a-32a.) Here, the Ninth Circuit found that a rational jury could conclude the declining account statements would not have spurred a reasonable investor in Betz's situation to inquire further about probable fraud. The account statements indicated, at most, that the defendants failed to fulfill their oral promise to provide the specified monthly withdrawals without depleting principal. (App. 20a-21a) But the declining account balance did not give Betz reason to believe the defendants intentionally lied in making the prior promise. *See, DeMarco,* 309 F.Supp.2d at 637.

The Ninth Circuit applied its own established precedent in holding that the declining account balance, by itself, would not necessarily spur a reasonable investor to inquire further about whether she had been defrauded. (App. 21a, *citing Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996) (poor financial performance, standing alone, does not necessarily suggest securities fraud); *Livid Holdings, Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 951 (9th Cir. 2005) (financial problems alone generally are insufficient to suggest fraud).) Even the Eleventh Circuit has balked at adopting a *per se* rule of inquiry notice based on a certain drop in stock price. *La Grasta v. First Union Securities,* 358 F.3d 840, 849 (11th Cir. 2004).

The defendants insist that the Ninth Circuit decision clashes with cases from other circuits. These other circuit court decisions purport to hold that inquiry notice is triggered the moment the plaintiff learns facts that either contradict a promise or contain "subtler clues" to cast doubt on its truthfulness. (*See,* Petition, pp. 21-23.) But the decisions impose no *per se* rule. Indeed, the *Ritchey*

decision cited by the defendants reveals that such factual disputes may be inappropriate for disposition by summary judgment. *See, Ritchey v. Horner*, 244 F.3d at 641 (summary judgment reversed).

The defendants' reliance on the *Whirlpool* decision may be the most questionable. *See,* W*hirlpool Fin. Corp. v. GN Holdings*, 67 F.3d 605, 610 (7th Cir. 1995) (dramatic discrepancy between precise projections and actual results raised fraud as "possible explanation"). *Whirpool* is no longer the controlling law in the Seventh Circuit because of the "probability" standard established in *Fujisawa* and *Marks*. *In re Motorolla Securities Litigation*, 505 F.Supp.2d at 534.

The defendants cannot rely on other distinguishable decisions where inquiry notice was established from the detailed risk disclosures in a written prospectus or subscription agreement. *See, e.g., Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351 (2d Cir. 1993); *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162-63 (4th Cir. 1993); *Topalian v. Ehrman*, 954 F.2d 1125, 1132-34 (5th Cir. 1992). The defendants argue that their written "Letter of Understanding" is comparable to such documents because of its boilerplate disclosures about the risk of investment and the potential loss of principal. (Petition, p. 23; ER 380-84) But the defendants' own *Cooperativa* decision discounted the significance of such boilerplate disclosures. *See, Cooperativa De Ahorro Y. Credito Aquada v. Kidder, Peabody & Company*, 129 F.3d 222, 225 (1st Cir. 1997) (little weight given to boilerplate disclosures not specifically directed to securities at issue). More importantly, the Letter of Understanding here contained no "integration" or "merger" clause and made no

reference to Como's oral promises. (App. 4a-5a; ER 380-84)

Nor can the defendants rely on decisions where storm warnings were established from more substantial evidence than a declining account balance. *See, e.g., DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 216-17 (3rd Cir. 2007) (registration statement, press releases and numerous news reports disclosed specific risk that brokers received higher commissions from the sale of more than $100,000 of Class B shares); *Wyser-Pratte Management Co., Inc. v. Telxon Corporation,* 413 F.3d 553, 563-64 (6th 2005) (financial restatements based on "review of certain judgmental accounting matters" that wiped out $16.7 million in earnings, collapse of transaction following review of corporate records, shareholder class actions and SEC's commencement of formal investigation of accounting practices); *New England Health Care Employees Pension Fund v. Ernst & Young,* 336 F.3d 495, 502 (6th Cir. 2003) (plaintiff knew that auditor's financial statements did not adhere to GAAP when it filed earlier complaint raising same issue against corporation).

In the end, the defendants fail to show any irreconcilable clash among the circuits that would require Supreme Court intervention. And the Ninth Circuit did not depart from existing law in concluding that the decline in Betz's account balance was insufficient to trigger inquiry notice.

B. The Ninth Circuit properly applied the second prong of its inquiry notice plus reasonable diligence test in considering the defendants' specific assurances.

Even if the Ninth Circuit arguably erred in assessing when suspicious circumstances arose, this Court still should deny the writ because the Ninth Circuit reached the correct result in the second prong of its inquiry. At this second stage, the Ninth Circuit held that it could consider the "express assurances made by the [d]efendants that they would remedy the problems in [Betz's] account, which may have lulled a reasonable investor into inaction." (App. 23a) Finding a genuine factual dispute over when Betz should have discovered the fraud, the Ninth Circuit concluded that a jury must determine "whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right." (App. 23a)

In attacking the Ninth Circuit decision, the defendants discount their express promises from the highest level of the securities firm as no more than a "vague assurance." (Petition, p. 29; *Cf.*, ER 707) Instead, the defendants place greater emphasis on other more general assurances from Vile and Como that Betz's account would recover. (Petition, pp. 29) With this shift of emphasis, the defendants ignore the summary judgment rule that the evidence must be viewed in the light most favorable to Betz as the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255.

By mischaracterizing the facts, the defendants create the illusion that "the Ninth Circuit stands alone, and dramatically so, against the tide of all other circuits." (Petition, p. 30) To support this illusion, the defendants employ Judge Kozinski's disparaging reference to the Ninth Circuit panel's "loosey-goosey standard." (Petition, p. 30, *citing* App. 38a.) And once again, the defendants try to justify Supreme Court intervention by exaggerating a purported "persistent and intractable split" among the circuits. (Petition, p. 30) But on closer analysis, the Ninth Circuit applied prevailing case law in the second prong of its inquiry.

1. At the second stage of its inquiry, the Ninth Circuit could consider whether the defendants gave specific assurances to Betz which would have delayed discovery of the fraud by a reasonable investor in her position.

The defendants attack the Ninth Circuit's holding that, at the second stage of its inquiry, it could consider "whether the plaintiff was given assurances by the defendant after beginning to investigate the suspicious circumstances that would have delayed discovery of the fraud by a reasonable person in the plaintiff's position." (App. 17a) In holding it could consider assurances, the Ninth Circuit relied on its established precedent in *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1310 (9th Cir. 1982) (where investor met with representatives of defendant company about possible fraud and was assured there "had been no improprieties," question

of what reasonable investor should have done was for trier of fact).

In arguing that the Ninth Circuit holding on assurances stands alone, the defendants present a fictitious rift among the circuits between a "categorical" and "not quite so categorical" rule against an investor relying on assurances. (Petition, pp. 25-28) But the case law reveals no such intractable conflict among the circuits.

Confusing the Eighth Circuit for the First, the defendants argue that the Third and Eighth Circuits impose a categorical rule against consideration of assurances. (Petition, pp. 25, *citing Cooperativa De Ahorro Y Credito Aguada v. Kidder, Peabody & Company,* 129 F.3d 222, 225 (1st Cir. 1997) and *Mathews v. Kidder, Peabody & Co., Inc.,* 260 F.3d 239, 255 (3rd Cir. 2001).) Neither *Cooperativa* nor *Mathews* imposes such a categorical rule. Under the particular facts at issue, the courts simply rejected the significance of "bland generalities" and vague assurances that "everything was all right." *Cooperativa,* 129 F.3d at 225; *Mathews,* 260 F.3d at 255, n. 22. And contrary to the defendants' arguments, the Eighth Circuit has held that repeated assurances can create a genuine issue of material fact. *Ritchey v. Horner,* 244 F.3d at 641 (court could not say, as matter of law, that principal's repeated assurances about tax returns were unconvincing and that plaintiffs should have been led to investigate).

The defendants admit that the Second and Seventh Circuits do not impose a categorical rule against consideration of assurances. (Petition, p. 26, *citing LC Capital Partners v. Frontier Insurance Group, Inc.,* 318 F.3d 148, 155-56 (2nd Cir. 2003) (recognizing that reassuring statements will prevent

emergence of a duty to inquire or dissipate such duty in certain cases), and *Whirlpool Fin. Corp.v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995) (recognizing that equitable estoppel may apply where defendant took active steps to conceal evidence that plaintiff needed to assess claim).

The Ninth Circuit did not depart from prevailing case law in concluding that the defendants' specific assurances to Betz here created a genuine issue of material fact. Interestingly, two of the defendants' own cited decisions recognize that an investor may not be considered on inquiry notice if "warning signs are accompanied by reliable words of comfort from management" such that "an investor of ordinary intelligence would reasonably rely on them to allay the investor's concerns." *In re Exxon Mobil Corp. Securities Litigation*, 387 F. Supp.2d 407, 418 (D.N.J. 2005); *LC Capital Partners, LP v. Frontier Insurance Group, Inc.*, 318 F.3d at 155. The reassuring statements given in such circumstances operate to dissipate apparent storm warnings. *In re Daimler Chrysler AG Securities Litigation*, 269 F. Supp.2d 508, 515 (D.Del. 2003).

The question of whether assuring statements justify reasonable reliance that storm warnings have dissipated will depend on such factors as (1) how significant the company's disclosed problems are; (2) how likely they are of recurring; and (3) how substantial are the "reassuring" steps to avoid their recurrence. *LC Capital Partners, LP*, 318 F.3d at 155; *See, Milman v. Box Hill Systems Corp.*, 72 F.Supp. 2d 220, 229 (S.D.N.Y. 1999) (pricing disclosure did not create "storm warnings" when tempered with positive statement). Courts are more likely to reject generalized assurances of hope, devoid

of specific steps, *LC Capital Partners, LP*, 318 F.3d at 156; or assurances given when the investor has concrete evidence of the fraud. *DaimlerChrysler*, 269 F. Supp.2d at 515-16. But an investor like Betz may rely on more specific assurances that are meant to supplant rather than supplement written reports. *McCoy v. Goldberg*, 748 F. Supp. 146, 158-59 (S.D.N.Y. 1990).

Because the Ninth Circuit followed prevailing case law on assurances, the defendants cannot justify Supreme Court intervention on the theory either of (1) an imagined split among the circuits or (2) its erroneous charge that the Ninth Circuit decision stands alone. Even if the decline in Betz's account balance were deemed an apparent storm warning, the Ninth Circuit concluded that a jury question was raised over whether the warning was dissipated by "active assurances from the highest levels of the securities firm that there was no problem with [Betz's] account and all would be made right." (App. 23a; ER 707). The defendants' assurances that the head of the securities firm personally would take care of Betz's account were far more specific than a generalized hope that the market would recover. (ER 707) And the assurances were not made when Betz had concrete evidence that the defendants had intentionally lied in promising her $15,000 per month without touching principal. (20a-21a; ER 707) The Ninth Circuit did not "obliterate" the statute of limitations by concluding that the defendants' assurances created a genuine issue of material fact. (*See*, Petition, p. 30.)

2. The jury is better suited to determine what a reasonable investor should have known in Betz's particular circumstances.

The Ninth Circuit observed that the defendants bear a considerable burden in demonstrating, at the summary judgment stage, that the plaintiff's claim is time-barred. (App. 18a, *citing Seaboard Corp.*, 677 F.2d at 1309-10.) "Summary Judgment is appropriate only when the uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." (App. 18a, *quoting Gray*, 82 F.3d at 881.) And the Ninth Circuit was hesitant to approve summary judgment where, as here, the plaintiff alleges that the defendants' reassurances convinced the plaintiff to postpone his or her legal action. (App. 19a-20a, *citing Vucinich v Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1436 (9th Cir. 1984).)

Viewing the factual record in the light most favorable to Betz, this Court must credit Betz's testimony that she was not a sophisticated investor, but she did make inquiries about the drop in the bottom line of her account. (ER 666, 691, 706) (Petition, pp. 7-8, *citing* ER 317-18, 328-33, 373.) When Betz made such inquiries, Como and Vile assured her that the losses were temporary and the stock would recover. (ER 693, 697-99, 707) And this Court must credit Betz's testimony that she was assured later by Castro, by spring 2001, that the president of Trainer Wortham would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client

relationships..." (ER 707) And that in May 2002, after Betz met with Moore, Castro called Betz to tell her that "Moore was meeting with other principals and attorneys" regarding her account, and that Betz "should be patient with them and not take any legal action." (App 5a; ER 707)

For summary judgment purposes, the Ninth Circuit could draw the reasonable inference from this record that the defendants strung Betz along with specific assurances until they assumed, albeit incorrectly, that they had beaten the statute of limitations. It was only then that Castro told Betz that Trainer Wortham was "not going to do anything at all" to remedy the declining value of her account. (ER 707) The Ninth Circuit did not err in seeing through this subterfuge. The Ninth Circuit properly held that the jury is better suited to determine what a reasonably prudent investor should have known in these circumstances. (App. 23a)

II. BECAUSE THE NINTH CIRCUIT DECISION IS CONSISTENT WITH THE INQUIRY NOTICE RULES APPLIED BY MOST COURTS, THIS APPEAL PRESENTS NO ISSUE OF PROFOUND NATIONAL IMPORTANCE.

The defendants argue that this appeal presents issues of "profound national importance." (Petition, p. 31). To justify this erroneous conclusion, the defendants rely on this Court's holdings about (1) its preference for uniform federal statutes of limitations and (2) the cost of groundless securities fraud claims. (Petition, pp. 31-34) But this appeal does not address either concern. Because the Ninth Circuit followed prevailing inquiry notice rules, this appeal presents

no issue of profound national importance that requires Supreme Court intervention.

This appeal does not present an issue that would invoke this Court's preference for a uniform federal statute of limitations over multiple state statutes. This Court resolved that issue for §10(b) cases in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991). The defendants cannot elevate the issues here to prime importance just because this Court has expressed a similar preference for a uniform federal statute of limitations in other contexts. *See, e.g, Jones v. R.R. Donnelley & Sons Company,* 541 U.S. 369, 379 (2004) (applied federal 4-year statute of limitations to §1981 claims made possible by post-1990 enactment); *Agency Holding Corporation v. Malley-Duff & Associates, Inc.,* 483 U.S. 143, 154 (1987) (applied 4-year statute of limitations in Clayton Act to RICO claims).

Nor does this appeal invoke the Court's concern over the cost of frivolous securities fraud claims. The issue here in not whether Betz has a frivolous claim—but whether she raised a genuine factual dispute over when she should have discovered the defendants' fraud. In contending that the statute of limitations issue is of profound importance, the defendants cannot rely on this Court's interpretation of other securities law provisions. *See, e.g., Stoneridge Investments Partners, LLC v. Scientific-Atlanta, Inc.,* 128 S.Ct. 761, 772 (2008) (private action under §10(b) did not cover aiding and abetting liability); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 127 S.Ct. 2499, 2504 (2007) (interpreted scienter pleading standards under PSLRA); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit,* 547 U.S. 71, 86 (2006) (SLUSA pre-empted state class action lawsuits

for securities fraud); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (rejected "inflated purchase price" approach to loss causation under §10(b)). These cases have no bearing on the inquiry notice standards under 28 U.S.C. §1658(b).

"This Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission (SEC)." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. at 2504. Congress enacted the PSLRA in 1995 as a check against abusive litigation by private parties. *Id.* But in the wake of the Enron debacle, Congress sought to protect investors by extending the limitations period for §10(b) actions. *See*, Sarbanes-Oxley Act of 2002, Pub.L.No. 107-204, §804, 116 Stat. 745, 801 (2002). In their Petition, the defendants raise inquiry notice issues under the extended statute of limitations in Sarbanes-Oxley—not under the heightened pleading standards in the PSLRA.

This appeal presents no issue of profound national importance. Indeed, in the present era of risky hedge fund investments in subprime loans, now is hardly the time for this Court to impose a restrictive interpretation of the limitations period for §10(b) actions. If this Court were to grant the writ, it would only delay consideration of Betz's state law claims that will continue to go forward. The defendants go to great lengths to pit the Ninth Circuit against the other hopelessly "fractured" circuits. But Betz has shown that this picture is false. The Courts of Appeals are not fractured. And

the Ninth Circuit decision is consistent with prevailing case law on the inquiry notice issues.

CONCLUSION

For the foregoing reasons, Betz requests that this Court deny the defendants' Petition for Writ of Certiorari.

Respectfully submitted,

Theodore F. Schwartz
230 South Bemiston Ave.
Suite 1010
St. Louis, Missouri 63105
(314) 863-4654

Joseph M. Alioto
Counsel of Record
555 California Street
Suite 3160
San Francisco,
California 94104
(415) 434-8900

Daniel R. Schramm
Timothy E. Hayes & Assoc., L.C.
231 South Bemiston Ave., Suite 950
St. Louis, Missouri 63105
(314) 726-6767

Counsel for Respondent

OPPOSITION BRIEF

SUPPLEMENTAL BRIEF

FILED
APR 30 2009
OFFICE OF THE CLERK

No. 07-1489

IN THE

Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,

Petitioners,

v.

HEIDE BETZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Sara B. Brody
SIDLEY AUSTIN LLP
555 California Street
San Francisco, California 94104
(415) 772-1279

E. Joshua Rosenkranz
Counsel of Record
Steven J. Fink
Warrington S. Parker III
ORRICK, HERRINGTON
& SUTCLIFFE LLP
666 Fifth Avenue
New York, New York 10103
(212) 506-5380

Counsel for Petitioners

April 30, 2009

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. QUESTION 1 PRESENTS CERT-WORTHY CONFLICTS, ALONG TWO DIMENSIONS, ABOUT WHEN THE SECURITIES FRAUD STATUTE OF LIMITATIONS BEGINS RUNNING. 1

A. This Case Presents the Question How Much Evidence of Scienter a Plaintiff Must Possess to Trigger Either Inquiry Notice or the Running of the Statute of Limitations. 2

B. This Case Presents This Court with the Opportunity to Resolve the Relationship Between Inquiry Notice and When the Statute of Limitations Begins to Run. 3

C. This Case Is the Superior Vehicle for Resolving Both Conflicts. 5

II. THE NINTH CIRCUIT STANDS IN CONFLICT WITH EVERY OTHER CIRCUIT IN HOLDING THAT THERE CAN STILL BE A JURY QUESTION AS TO WHETHER AN INVESTOR MAY RELY ON ASSURANCES EVEN IF THE ASSURANCES CONTRADICT KNOWN FACTS. 8

III. IF THE COURT GRANTS CERTIORARI IN *MERCK*, IT SHOULD HOLD THIS CASE PENDING THE OUTCOME OF *MERCK*. 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases

Alaska Elec. Pension Fund. v. Pharmacia Corp., 554 F.3d 342 (3d Cir. 2009) 6

DeBenedictis v. Merrill Lynch & Co., 492 F.3d 209 (3d Cir. 2007) 5

LC Capital Partners, LP v. Frontier Ins. Group, Inc., 318 F.3d 148 (2d Cir. 2003) 5, 11

Mathews v. Kidder Peabody & Co., 260 F.3d 239 (3d Cir. 2001) 5

In re Merck & Co. Secs., Derivative & ERISA Litig., 543 F.3d 150 (3d Cir. 2008), *petition for cert. filed*, 2009 WL 133458 (U.S. Jan. 15, 2009) (No. 08-905) 6, 7, 8

New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003) 4

Newman v. Warnaco Group, Inc., 335 F.3d 187 (2d Cir. 2003) 11

Ritchey v. Horner, 244 F.3d 635 (8th Cir. 2001) 10

Staehr v. Hartford Fin. Servs. Group, Inc., 547 F.3d 406 (2d Cir. 2008) 11

Tello v. Dean Witter Reynolds, Inc., 494 F.3d 956 (11th Cir. 2007) 4

Miscellaneous

Merck & Co. v. Reynolds, No. 08-905, 2009 WL 133458 (U.S. Jan. 15, 2009) 1, 5, 6, 7

INTRODUCTION

Petitioners submit this brief, pursuant to Supreme Court Rule 15.8, in response to two developments since the submission of their Petition: (1) the recent filing of a Brief for the United States as Amicus Curiae recommending that the Court deny certiorari in this case; and (2) the filing of a petition for a writ of certiorari in *Merck & Co. v. Reynolds*, No. 08-905, 2009 WL 133458 (U.S. Jan. 15, 2009), presenting the same question presented here.

The Government and Merck both argue that the Ninth Circuit's analysis is deeply flawed. Both also confirm the need for this Court's guidance on the question when the statute of limitations begins to run in private securities fraud actions. But the Government argues that this case will not necessarily require the Court to resolve the issue presented, and Merck argues that its case is a better vehicle for resolution of the question presented. Both are incorrect.

I. QUESTION 1 PRESENTS CERT-WORTHY CONFLICTS, ALONG TWO DIMENSIONS, ABOUT WHEN THE SECURITIES FRAUD STATUTE OF LIMITATIONS BEGINS RUNNING.

The Government confirms that the circuits are split along two dimensions, with regard to when the statute of limitations begins running. One split—the much more important of the two—concerns evidence of scienter. *See* U.S. Br. at 17-18. The other split concerns the relationship between inquiry notice and

when the statute of limitations begins running. *See id.* at 13-17. This case is the optimal vehicle for resolving both splits.

A. This Case Presents the Question How Much Evidence of Scienter a Plaintiff Must Possess to Trigger Either Inquiry Notice or the Running of the Statute of Limitations.

The Government characterizes the first question as "*whether* 'inquiry notice' requires *information suggesting* that a defendant's possible misstatement was made with scienter." *Id.* at 13 (emphasis added). The Government correctly observes that some courts (the Tenth and Eleventh Circuits) hold that inquiry notice is triggered the moment an investor knows of a possible misstatement. "[S]uspicion of scienter is not required . . . ." *Id.* at 17. Other courts (most notably the Third Circuit) take the view that an investor must also have "information suggesting . . . scienter." *Id.* at 13.

The Government's depiction, however, is incomplete. These are not the only two approaches, and the Ninth Circuit is not in the Third Circuit's camp. The Ninth Circuit takes a more extreme position. Its standard does not revolve around whether Betz had facts that "suggested" scienter, *id.* at 18, or around the "possibility" or the "probability" of scienter, *id.* at 17 n.5. The Ninth Circuit's position is that an investor does not have to ask a single question until she has cold, hard "*evidence* that the defendants had intentionally or deliberately and recklessly" misled the investor. App. 21a (emphasis added); *see* App. 33a (Kozinski, C.J.,

dissenting). That is the only way to explain the outcome of this case. If the panel had intended to hold that scienter could be inferred from context, it would undoubtedly have drawn that inference here, for, as the Government observes, this is the classic "circumstance[] in which an innocent mistake is unlikely." U.S. Br. at 18.

The Government is also wrong in contending that this Court might be unable to reach the central question, because Betz "had *actual* knowledge of the facts constituting the violation." *Id.* at 5. The Ninth Circuit's holding—that an investor is not on inquiry notice unless she has "evidence" of scienter—necessarily means that an investor cannot be on *actual* notice without evidence of scienter. The Ninth Circuit's mistake, thus, lay in its conclusion that concrete evidence of scienter is required to prevail on a statute of limitations defense. This Court cannot reverse the Ninth Circuit without explicitly rejecting that conclusion.

B. This Case Presents This Court with the Opportunity to Resolve the Relationship Between Inquiry Notice and When the Statute of Limitations Begins to Run.

The second split transcends the issue of scienter. The Government acknowledges that there are "significant differences in [the circuits'] approaches" as to when the statute of limitations begins to run. *Id.*. at 14. Nevertheless, the Government opines that this case does not present the Court with an opportunity to choose among the competing standards, because "[t]he result in this case would not be affected by applying" one approach over

another. *Id.* at 16.

The Government is incorrect in asserting that this case presents no opportunity to resolve the legal conflict. Because the various approaches entail different standards, they afford Betz different opportunities to advocate against the statute of limitations defense.

The most straightforward scenario would arise if the Court were to adopt the Eleventh Circuit's approach. The clock would begin to run from the receipt of "storm warnings"—what the Eleventh Circuit terms "the possibility of fraud"—whether or not Betz conducted an investigation. *See, e.g., Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 971 (11th Cir. 2007). So the statute of limitations would have begun to run the moment Betz's principal declined.

In contrast, if this Court were to adopt the majority view—the one the Government advocates—the statute of limitations would have begun to run from the (later) date on which a reasonably diligent inquiry would have uncovered the fraud. *See, e.g., New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003). The parties would then be left to squabble—possibly on remand—over how long a reasonably diligent inquiry should have taken. Petitioners would argue, as the Government seems to suggest, that the period of inquiry should be short. It takes but one phone call to ascertain that the account statements were accurate. *See* U.S. Br. at 13. Betz would still be able to argue that she was justified in taking longer to investigate, particularly in light of

the assurances she received.

Similarly, if this Court were to adopt the Second or the Third Circuit's approach, the clock might start running from the receipt of "storm warnings" or it might start running later—depending upon whether Betz carried her burden of proving that she "'exercised reasonable due diligence and yet [was] unable to discover [the] injuries.'" *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007) (citation omitted). Contrary to the Government's assertion, it would not necessarily suffice to demonstrate that Betz "did undertake some inquiry." U.S. Br. at 16. "[S]ome inquiry" might satisfy the Second Circuit, *LC Capital Partners, LP v. Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003), but the Third Circuit would require Betz to conduct "reasonable due diligence," *Mathews v. Kidder Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001), in which case, once again, the parties would battle over the reasonableness of Betz's inquiry.

In short, there is almost no way to resolve the statute of limitations defense in this case without first determining what the legal rule is.

C. This Case Is the Superior Vehicle for Resolving Both Conflicts.

In framing its cert. petition, Merck focuses mainly on the first dimension of the circuit split—the role of scienter. It asks: "Did the Third Circuit err in holding, in accord with the Ninth Circuit . . . , that under the 'inquiry notice' standard . . . , the statute of limitations does not begin to run until an

investor receives evidence of scienter . . . ." *Merck* Pet. at i. Merck then argues that its "case is the superior vehicle for" answering this question. *Id.* at 33. Merck is incorrect.

Initially, as much as Merck tries to tether the Third Circuit's standard in *Merck* to the Ninth Circuit's standard here, the Third Circuit did not adopt the standard Merck attributes to it. The *Merck* court did not hold (as the Ninth Circuit did in this case) that "the statute of limitations does not begin to run until an investor *receives evidence* of scienter." *Merck* Pet. at i (emphasis added). Rather, the Third Circuit applied the rule that the Government describes as the majority rule: The investor is on inquiry notice when he has "*sufficient information to suspect* that the defendants engaged in culpable activity, i.e., that they did not hold those opinions or beliefs in earnest." *In re Merck & Co. Secs., Derivative & ERISA Litig.*, 543 F.3d 150, 166 (3d Cir. 2008) (emphasis added), *petition for cert. filed*, 2009 WL 133458 (U.S. Jan. 15, 2009) (No. 08-905); *see also id.* at 172. In a subsequent case, the Third Circuit quoted that same passage, and emphasized that it was reviewing the public record for "a possibility of fraud," for "some *reason to suspect* that defendants did not genuinely believe the accuracy of their statements"—not for concrete proof of fraudulent intent. *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 554 F.3d 342, 350 (3d Cir. 2009).

This case is also a better vehicle because there is a fully developed factual record, and not simply the untested allegations of a complaint on which the *Merck* opinion is premised. With *Merck*, there is a danger that the Court will come to realize that it

must affirm the Third Circuit, without resolving the question presented, because the rules governing 12(b)(6) motions might compel the Court to read the complaint liberally and sustain it under any legal rule.

Merck tries to turn this blemish into a virtue, arguing that its "case is the better vehicle because it involves a pure question of law." *Merck* Pet. at 33. But this case, too, presents a pure question of law—and a cleaner one at that. For purposes of the summary judgment motion, Petitioners' adopted Betz's own testimony and version of what she knew and when she knew it. In contrast, the legal issues in *Merck* are enshrouded in a fog of complicated questions about the proper inferences to be drawn from a barrage of conflicting news reports, agency actions, stock analyst reports, stock fluctuations, and lawsuits. *See* 543 F.3d at 167-72.

Merck next contends that its case is a better vehicle because it is "an archetypal securities fraud case"—"a large, multi-district class action brought against a defendant-corporation based on alleged misrepresentations to the investing public." *Merck* Pet. at 34. However, the majority of securities fraud cases involve, not class actions, but as here, individual investors disappointed by failed investments—a scenario that is sure to proliferate in the current economic climate.

Finally, Merck contends that the existence of a second question presented by this Petition—about the role of assurances—makes this case an inferior vehicle. *Id.* at 34-35. But *Merck*, too, repeatedly, and at some length, grapples with the implications

of Merck's assurances. *See* 543 F.3d at 167-68 & n.14, 172.

For reasons explained below, the issue about assurances is independently cert-worthy. *See* Point II. But even if this Court decided to grant cert. only to the first question presented, the Ninth Circuit's alternative holding does not moot that question. Some resolutions of the first question would require reversal of the Court of Appeals, even were the alternative holding left unreviewed. For example, were the Court to adopt the Eleventh Circuit's rule, Betz was on inquiry notice when she received the first "storm warnings"—the first statements indicating that her principal was declining. At that point, the adequacy of the investigation would have no bearing on the outcome of the case, and there would be no reason to resolve the effect of the assurances.

II. THE NINTH CIRCUIT STANDS IN CONFLICT WITH EVERY OTHER CIRCUIT IN HOLDING THAT THERE CAN STILL BE A JURY QUESTION AS TO WHETHER AN INVESTOR MAY RELY ON ASSURANCES EVEN IF THE ASSURANCES CONTRADICT KNOWN FACTS.

The Government correctly observes "that the alleged assurances on which the court of appeals relied in this case did not establish a jury question on whether [Betz's] suit was timely filed." U.S. Br. at 20. Yet, it erroneously concludes that this incorrect holding is not cert-worthy because determinations about the adequacy of assurances can often turn on "the particular circumstances of

each case." *Id.* at 19.

The Government makes this mistake largely because it misstates the question Petitioners are presenting. Petitioners do not present the general question "[w]hether an investor who has been placed on 'inquiry notice' may reasonably delay further investigation of the defendant's possible fraud on the basis of assurances by the defendant." *Id.* at i. Stated at that level of generality, the Government is correct; the answer varies depending on the circumstances. But Petitioners have narrowed their question to a subset of cases involving assurances—a very large subset: whether "an investor who is on inquiry notice . . . may reasonably end her investigation just because the suspected defrauders have made assurances *that contradict known facts.*" Pet. i (emphasis added). The question presented is, therefore, limited to the situation where (1) the investor has learned facts that raise the suspicion that he has been defrauded and (2) the suspected defrauders' assurances fail to cast those facts in an innocent light, instead merely urging the investor to ignore the facts she has already learned.

On this more precise question, the Ninth Circuit stands diametrically against every other circuit—on virtually identical facts. The known facts (as alleged by Betz) were that Petitioners said they would deliver a return of $15,000 a month without "touch[ing] the principal," App. 4a, yet Petitioners did, indeed, touch the principal. In order for Betz to accept the assurances as valid, she would need to have concluded—contrary to the facts she claims to have known—that Petitioners did not make such a promise or did, indeed, deliver the promised return

without touching principal. *See* U.S. Br. at 20. Yet, the Ninth Circuit held there was a jury question as to whether these assurances sufficed to dispel suspicions, thus relieving Betz of any duty to inquire.

The Petition describes multiple cases—from the Second, Third, Seventh, and Eighth Circuits—that reflect the same basic scenario as this case: a purported fraud, followed by assurances that do nothing to cast the purported misstatement in a different light. In every one of these cases, the courts found that the assurances did not prevent inquiry notice from triggering and did not stop the statute of limitations from running. *See* Pet. 25-29.

The Government does not dispute this. It asserts that cert. should be denied because "the significance for limitations purposes of a suspected defrauder's assurances is not determined by categorical rules." U.S. Br. at 19. That is incorrect, for at least some circuits do appear to apply a categorical rule. *See Ritchey v. Horner*, 244 F.3d 635, 640 (8th Cir. 2001) (referring to what "[c]ourts, including our own, . . . *have generally done*" with regard to assurances, and holding that the assurances were sufficient because "the record contain[ed] no evidence . . . that plaintiffs received or had access to any information contrary to [defendant's] assertions").

More to the point, it does not matter whether circuits reaching diametrically opposite conclusions speak in categorical terms of "never" or "always." What matters are the practical realities of how the courts on either side of the divide are applying their standards. First, the Ninth Circuit's opinion in this

case is binding precedent, and the court reached a conclusion that will almost certainly mean that assurances will typically raise questions of fact even when they contradict known facts. Second, every other circuit that has confronted a situation where an assurance contradicts known facts has reached the opposite result. Third, in each of the cases in this latter category, courts focus on the contradiction as a critical reason why the assurances were insufficient to create a jury question. Indeed, in a case decided after the filing of the Petition in this case, the Second Circuit underscored the importance of the point by explaining that this factor was the dispositive difference between two cases reaching opposite conclusions. *See Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 413-14 (2d Cir. 2008) (contrasting *LC Capital Partners* with *Newman v. Warnaco Group, Inc.*, 335 F.3d 187 (2d Cir. 2003), on this basis).

In short, the Ninth Circuit is the outlier not because of nuanced differences in analysis of facts, but because of stark differences in the application of legal standards.

III. IF THE COURT GRANTS CERTIORARI IN *MERCK*, IT SHOULD HOLD THIS CASE PENDING THE OUTCOME OF *MERCK*.

If the Court grants cert. in *Merck*, it should hold this Petition pending disposition of that case. Reversal of *Merck* is likely to require reversal of this case, as well. The issue *Merck* presents is virtually identical to the first question presented in this case, and Merck repeatedly argues that the Third Circuit and the Ninth Circuit adopted the same logic and

are wrong for the same reasons. Reversal is likely even though the Ninth Circuit adopted an alternative holding in this case—about the effect of Petitioners' assurances. First, as is noted above, *Merck*, too, involves assurances, and it is possible that this Court will reach conclusions about those assurances that will bear on the Ninth Circuit's analysis in this case. Second, as is also explained above, it is possible for this Court to adopt a legal standard on the first question presented that requires reversal without regard to the issue of assurances.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition and Reply, this Court should grant a writ of certiorari, or at a minimum hold this case pending resolution of *Merck*.

Respectfully submitted,

Sara B. Brody
SIDLEY AUSTIN LLP
555 California Street
San Francisco, CA 94104
(415) 772-1279

E. Joshua Rosenkranz
Counsel of Record
Steven J. Fink
Warrington S. Parker III
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103
(212) 506-5380

Counsel for Petitioners

April 30, 2009

SUPPLEMENTAL BRIEF

FILED
MAY 1 - 2009
OFFICE OF THE CLERK

No. 07-1489

In The
Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,

Petitioners,

v.

HEIDE BETZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

THEODORE F. SCHWARTZ
230 South Bemiston Ave.
Suite 1010
St. Louis, Missouri 63105
(314) 863-4654

DANIEL R. SCHRAMM
TIMOTHY E. HAYES & ASSOC., L.C.
231 South Bemiston Ave.
Suite 950
St. Louis, Missouri 63105
(314) 726-6767

JOSEPH M. ALIOTO
Counsel of Record
555 California Street
Suite 3160
San Francisco,
California 94104
(415) 434-8900

Counsel for Respondent

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Introduction 1

I. BETZ AGREES WITH THE SOLICITOR GENERAL THAT THE NINTH CIRCUIT APPLIED CORRECT "INQUIRY NOTICE" STANDARDS, BUT BETZ DISAGREES WITH THE SOLICITOR GENERAL'S UNWARRANTED ASSUMPTIONS ABOUT DISPUTED FACTS..... 1

A. The Solicitor General's view that "storm warnings" must suggest the required element of scienter is consistent with a developing body of case law..... 3

B. The Solicitor General draws unwarranted assumptions in speculating about disputed factual issues..... 5

II. BETZ ALSO AGREES WITH THE SOLICITOR GENERAL THAT THE NINTH CIRCUIT CORRECTLY TREATED ASSURANCES AS A FACT-DEPENDENT QUESTION, BUT AGAIN, THE SOLICITOR GENERAL MISAPPLIED HER CONCLUSION TO THE FACTS OF THIS CASE. ... 7

A. The Solicitor General properly rejected any categorical rule against consideration of assurances..... 7

B. The Solicitor General misconstrues the facts in concluding that the defendants' assurances raised no jury question.....9

Conclusion 11

TABLE OF AUTHORITIES

Page

Case Law

Alaska Elec. Pension Fund v. Pharmacia Corp., 543 F.3d 342 (3rd Cir. 2009).....3

Cooperativa DeAhorro Y. Credito Aquada v. Kidder, Peabody & Company, 129 F.3d 222 (1st Cir. 1997) 8

DaimlerChrysler Ag Securities Litigation, 269 F.Supp. 2d 508 (D.Del. 2003) 4

DeMarco v. Lehman Brothers, Inc., 309 F.Supp.2d 631 (S.D.N.Y. 2004) 4, 6

In re Imperial Credit Industries, Inc., Securities Litig., 2000 U.S. Dist. LEXIS 2340 (C.D. Cal. Feb. 23, 2000) (unpublished).....4

In re Merck & Co., Sec., Derivative & "ERISA" Litig., 543 F.3d 150 (3rd Cir. 2008), petition for certiorari pending, No. 08-905 (filed Jan. 15, 2009).....3

In re Micron Technologies, Inc. Securities Litigation, 2007 U.S. Dist. LEXIS 12446 (D.Idaho Feb. 21, 2007) (unpublished) 4

Law v. Medco Research, Inc., 113 F.3d 781 (7th Cir. 1997) 3

LC Capital Partners, LP v. Frontier Insurance Group, Inc., 318 F.3d 148 (2nd Cir. 2003) 8

Levitt v. Bear Stearns & Co., 340 F.3d 94 (2nd Cir. 2003) 3

Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123 (1st Cir. 1987)..... 4

Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3rd Cir. 2001)..... 8

Motorola Securities Litigation, 505 F. Supp.2d 501 (N.D.Ill. 2007) 4

Richey v. Horner, 244 F.3d 635 (8th Cir. 2001) 8

Stachr v. Hartford Fin. Servs. Group, Inc., 547 F.3d 406 (2nd Cir. 2008).....3

Sterlin v. Biomune Systems, 154 F.3d 1191 (10th Cir. 1998) 4

Swartz v. Deutsche Bank, 2008 U.S. Dist. LEXIS 36139 (W.D. Wash. 2008) (unpublished).....4

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499 (2007)..... 2

Theodarous v. Fong, 256 F.3d 1219 (11th Cir. 2001) 4

Statute

28 U.S.C. §1658(b) 1

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Respondent Heide Betz agrees with the Solicitor General that the Ninth Circuit applied the correct legal standards in its decision. The Ninth Circuit applied the correct standards both for "inquiry notice" and the fact-specific question of whether the defendants' assurances thwarted Betz's investigation. And Betz agrees with the Solicitor General's conclusion that the petition for a writ of certiorari should be denied. But Betz disagrees with the Solicitor General in her assessment of the facts of this particular case. This factual dispute is not cert-worthy. Betz nevertheless is compelled to file this supplemental brief in support of the Ninth Circuit's decision.

I. BETZ AGREES WITH THE SOLICITOR GENERAL THAT THE NINTH CIRCUIT APPLIED CORRECT "INQUIRY NOTICE" STANDARDS, BUT BETZ DISAGREES WITH THE SOLICITOR GENERAL'S UNWARRANTED ASSUMPTIONS ABOUT DISPUTED FACTS.

The Solicitor General concludes that the Ninth Circuit "applied the correct legal standards for determining whether a claim for securities fraud is barred by the two-year limitations period contained in 28 U.S.C. §1658(b)." U.S. Br. 6. She found a broad consensus among the courts of appeals that Section 1658(b) incorporates the concept of "inquiry notice." U.S. Br. 13. And she noted that most circuits apply

the same two-step inquiry applied by the Ninth Circuit here. U.S. Br. 14.

The Solicitor General also states that the Ninth Circuit "was correct in holding that an investor is not placed on 'inquiry notice' until he is apprised of information suggesting that the defendant acted with scienter." U.S. Br. 8. This is because scienter is a critical element of the "facts constituting the violation." U.S. Br. 11, citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 (2007). The "inquiry notice" concept serves to identify the point when a reasonably diligent investor would suspect "a violation of his legal rights" and undertake further investigation. U.S. Br. 11. The Solicitor General's analysis reveals that five circuits, including the Ninth, have issued decisions to support her view that "inquiry notice" requires information suggesting intentional fraud. *See*, U.S. Br. 17, at n. 5.

Betz agrees with the Solicitor General's legal conclusions. But Betz departs with the Solicitor General when she draws unwarranted assumptions about the facts. *See*, U.S. Br. 13. Contrary to what the Solicitor General asserts, the facts viewed most favorably to Betz create a genuine factual dispute over what a reasonably diligent investor in Betz's position should have known. The Ninth Circuit's decision should not be disturbed.

A. The Solicitor General's view that "storm warnings" must suggest the required element of scienter is consistent with a developing body of case law.

The Solicitor General's view of the scienter question is consistent with a developing body of case law. Since the defendants petitioned for certiorari in this appeal, the Third Circuit has joined the Ninth Circuit in holding that "storm warnings" must indicate that the defendants acted with scienter. *Alaska Elec. Pension Fund v. Pharmacia Corp.*, 543 F.3d 342, 348 (3rd Cir. 2009), citing *In re Merck & Co., Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150, 166 (3rd Cir. 2008), petition for certiorari pending, No. 08-905 (filed Jan. 15, 2009). And the Second Circuit reaffirmed its rule that "storm warnings" arise only when specific evidence suggests a probability of fraud. *Staehr v. Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 427 (2nd Cir. 2008).

Before the defendants filed their petition, the Second and Seventh Circuits held that the statute of limitations will not start to run unless the plaintiff knew or should have known of a *knowing* violation. *Levitt v. Bear Stearns & Co.*, 340 F.3d 94, 101 (2nd Cir. 2003) (question is whether reasonable inquiry would have revealed enough information to satisfy PSLRA pleading requirements); *Law v. Medco Research, Inc.*, 113 F.3d 781, 786 (7th Cir. 1997) (statute of limitations does not run until plaintiffs knew or should have known that defendants "made a representation that was knowingly false"). The Solicitor General states that the First Circuit approach also supports her view that "inquiry notice" requires information that raises a suspicion of deliberate wrongdoing. U.S. Br. 17, at n. 5, citing

Maggio v. Gerard Freezer & Ice Co., 824 F.2d 123, 128 (1st Cir. 1987).

Federal district courts have followed the lead of these circuits in holding that "inquiry notice" does not trigger the running of the statute of limitations before the plaintiff has notice that the defendants acted with the requisite scienter. *In re Micron Technologies, Inc. Securities Litigation* 2007 U.S. Dist. LEXIS 12446 *14 (D.Idaho Feb. 21, 2007) (unpublished); *DaimlerChrysler Ag Securities Litigation*, 269 F. Supp.2d 508, 517, n. 5 (D.Del. 2003); *DeMarco v. Lehman Brothers, Inc.*, 309 F.Supp.2d 631, 637 (S.D.N.Y. 2004); *In re Motorola Securities Litigation*, 505 F. Supp.2d 501, 526 (N.D.Ill. 2007); *In re Imperial Credit Industries, Inc., Securities Litig.*, 2000 U.S. Dist. LEXIS 2340 *15 (C.D. Cal. Feb. 23, 2000) (unpublished); *Swartz v. Deutsche Bank*, 2008 U.S. Dist. LEXIS 36139 *21-24 (W.D. Wash. 2008) (unpublished). This growing body of case law undercuts Judge Kozinski's contention that there "*is* no authority" for the Ninth Circuit's scienter ruling. Pet. App. 33a.

The Solicitor General acknowledges a possible circuit conflict on the scienter question with the Tenth and Eleventh Circuits. U.S. Br. 17, citing *Sterlin Biomune Sys.*, 154 F.3d 1191, 1203 (10th Cir. 1998) and *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001). But neither *Sterlin* nor *Theodorous* squarely confronted the scienter issue. The courts merely expressed the view that "inquiry notice" was triggered by a "possibility" and not "probability" of fraud. Those courts that have faced the scienter question agree with the Ninth Circuit. The mere possibility of a potential conflict does not justify Supreme Court intervention.

B. The Solicitor General draws unwarranted assumptions in speculating about disputed factual issues.

Betz agrees with the Solicitor General's legal conclusions, but Betz disputes the Solicitor General's assessment of the facts. The Solicitor General speculates about what Betz should have guessed from one defendant's fraudulent assurance.

The Solicitor General focuses on an assurance given to Betz by defendant Robert Vile in March 2001. Vile told Betz the decrease in her account was attributable to her monthly withdrawals, but "that the shortfall was temporary, that the market would recover, and that in a year or less her account balance would be back to $2.2 million." U.S. Br. 2, citing Pet. App. 5a. Without citing the record, the Solicitor General mischaracterizes Vile's assurance as "[defendants'] confirmation that the investment in risky equities was not a mistake." U.S. Br. 5. The Solicitor General repeats the same inaccuracy when she states: "That response confirmed that [defendants] had, apparently intentionally, invested [Betz's] assets in risky equities rather than investment vehicles that would preserve her principal as [defendants] allegedly had promised." U.S. Br. 13.

The Solicitor General's conclusions do not flow logically from what Betz was told. Vile assured Betz that the shortfall was temporary and that the market would recover. Pet. App. 5a. This defendant said nothing to confirm or suggest that the defendants had fraudulently placed her in unsuitable investments. Betz had no reason to believe, based on what she was told, that the defendants acted with fraudulent intent or that they had placed her in "risky equities." Indeed, the purpose of the assurance

was to dispel any concern about the nature of her investments.

Nor can the Solicitor General draw her unwarranted conclusions just because Vile's assurance was given when Betz's account balance was declining. The Ninth Circuit properly found that a rational jury could conclude the declining account statements would not have spurred a reasonable investor in Betz's situation to inquire further about probable fraud. The account statements indicated, at most, that the defendants failed to fulfill their oral promise to provide the specified monthly withdrawals without depleting principal. Pet. App. 20a-21a. But the declining account balance did not give Betz reason to believe the defendants intentionally lied in making the prior promise. *See, DeMarco v. Lehman Brothers, Inc.*, 309 F.Supp.2d at 637.

This Court should not disturb the Ninth Circuit's decision that Betz raised a genuine factual dispute over when "inquiry notice" arose. The Solicitor General cannot challenge this decision by conflating Vile's assurance with confirmation of intentional fraud.

II. BETZ ALSO AGREES WITH THE SOLICITOR GENERAL THAT THE NINTH CIRCUIT CORRECTLY TREATED ASSURANCES AS A FACT-DEPENDENT QUESTION, BUT AGAIN, THE SOLICITOR GENERAL MISAPPLIED HER CONCLUSION TO THE FACTS OF THIS CASE.

Betz takes the same view of the Solicitor General's position on the second prong of the two-step inquiry. The Solicitor General was correct in approving the Ninth Circuit's legal conclusion that there is no categorical rule against consideration of assurances. U.S. Br. 19. Yet the Solicitor General repeats her earlier mistake when she questions the Ninth Circuit's analysis of the facts. Betz disputes the Solicitor General's factual conclusion that defendants' assurances did not raise a jury question. U.S. Br. 20. But in the end, Betz concurs with the Solicitor General's recommendation that this fact-specific question does not warrant Supreme Court review. The Solicitor General correctly states that "the Ninth Circuit relied on the assurances only as an alternative ground for reversing the district court's grant of summary judgment to [defendants]." U.S. Br. 20.

A. The Solicitor General properly rejected any categorical rule against consideration of assurances.

The Solicitor General correctly analyzed circuit decisions when she rejected any categorical rule against assurances. U.S. Br. 19. Those circuits addressing the question support the Ninth Circuit's view that the significance of assurances "is not determined by categorical rules, but is instead based

on an analysis of the particular circumstances of each case." U.S. Br. 19, citing Pet. App. 17a; *LC Capital Partners v. Frontier Insurance Group, Inc.*, 318 F.3d 148, 155-56 (2nd Cir. 2003) (recognizing that reassuring statements will prevent emergence of a duty to inquire or dissipate such duty in certain cases), *Ritchey v. Horner*, 244 F.3d at 635, 640-41 (8th Cir. 2001) (court could not say, as matter of law, that principal's repeated assurances about tax returns were unconvincing and that plaintiffs should have been led to investigate).

The Solicitor General also was correct in rejecting the defendants' contention that the First and Third Circuits have created a "categorical rule" against assurances. U.S. Br. 19-20, discussing *Cooperativa De Ahorro Y Credito Aguada v. Kidder, Peabody & Company*, 129 F.3d 222, 225 (1st Cir. 1997) and *Mathews v. Kidder, Peabody & Co., Inc.*, 260 F.3d 239, 255 (3rd Cir. 2001). Neither *Cooperativa* nor *Mathews* imposes a categorical rule. Under the particular facts at issue, the courts simply rejected the significance of "bland generalities" and vague assurances that "everything was all right." *Cooperativa*, 129 F.3d at 225; *Mathews*, 260 F.3d at 255, n. 22.

Because the Solicitor General concludes there is no split among the circuits, this Court should not intervene to address the facts of this particular case. This Court does not accept cases to resolve factual disputes.

B. The Solicitor General misconstrues the facts in concluding that the defendants' assurances raised no jury question.

Despite Betz's agreement with the Solicitor General about the fact-specific nature of assurances, Betz again disputes the Solicitor General's assessment of the facts. The Solicitor General dismisses the effect of the defendants' assurances because she contends they were not given until May 2002. U.S. Br. 20, citing Pet. App. 5a. The Solicitor General asserts that this was "after [Betz] had actual knowledge of the alleged fraud and the two-year limitations period had begun to run." U.S. Br. 20. The Solicitor General premises this conclusion on her erroneous belief that the defendants gave no prior assurances, but instead, confirmed their fraud in March 2001. Betz has shown that this premise is untrue.

The Solicitor General also misconstrues the facts by overlooking Carmen Castro's assurance in spring 2001.[1] Castro assured Betz then that the president of Trainer Wortham would "take care of the account because it was 'the right thing to do' and because [Trainer Wortham] value[d] their client relationships...." ER 707. Castro made this specific assurance more than a year before May 2002. This later date referenced by the Solicitor General marked the president's personal meeting with Betz. Following this meeting, Castro called Betz to tell her that "[the president] was meeting with other principals and attorneys" regarding her account, and

---

[1] The record reveals some confusion over the date of this assurance. But based on Betz's deposition testimony, the District Court accepted 2001 as the correct year. Pet. App. 92a; ER 350-355.

that Betz "should be patient with them and not take any legal action." Pet. App 5a; ER 707. The Ninth Circuit was entitled to draw the reasonable inference from this record that the defendants were not confirming their fraud. Instead, they were stringing Betz along to beat the statute of limitations.

The Solicitor General admits the significance of assurances must be determined from an analysis of the particular circumstances of each case. In assessing those circumstances here, the Ninth Circuit determined that it could consider the "express assurances made by the [d]efendants that they would remedy the problems in [Betz's] account, which may have lulled a reasonable investor into inaction." Pet. App. 23a. Finding a genuine factual dispute over when Betz should have discovered the fraud, the Ninth Circuit concluded that a jury must determine "whether a reasonable investor would have discovered the fraud while receiving active assurances from the highest levels of the securities firm that there was no problem with her account and all would be made right." Pet. App. 23a.

The Ninth Circuit decision should not be disturbed.

CONCLUSION

Betz requests that this Court deny the defendants' Petition for Writ of Certiorari.

Respectfully submitted,

Theodore F. Schwartz
230 South Bemiston Ave.
Suite 1010
St. Louis, Missouri 63105
(314) 863-4654

Joseph M. Alioto
Counsel of Record
555 California Street
Suite 3160
San Francisco,
California 94104
(415) 434-8900

Daniel R. Schramm
Timothy E. Hayes & Assoc., L.C.
231 South Bemiston Ave., Suite 950
St. Louis, Missouri 63105
(314) 726-6767

Counsel for Respondent

REPLY BRIEF

FILED
JUL 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1489

IN THE

Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., DAVID P. COMO, FIRST REPUBLIC BANK, a Nevada Corporation, and ROBERT VILE,

Petitioners,

v.

HEIDE BETZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Sara B. Brody
Alexander M.R. Lyon
Colin E. Kelley
HELLER EHRMAN LLP
333 Bush Street
San Francisco, California 94104
(415) 772-6000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, New York 10036
(212) 832-8300

Counsel for Petitioners

July 10, 2008

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. BETZ ACKNOWLEDGES ONE CIRCUIT SPLIT AND FAILS TO EXPLAIN AWAY THE OTHER. 1

A. Betz Concedes that the Circuits Are Split Over When the Statute of Limitations for Securities Fraud Begins to Run. 2

1. Betz explicitly acknowledges that the circuits were split even before the Ninth Circuit weighed in on this case. 2

2. Betz concedes that other circuits do not follow the Ninth Circuit's scienter-based inquiry notice standard and would have decided this case differently. 5

B. Betz Is Unable to Harmonize the Ninth Circuit's Approach to Reasonable Inquiry with the Approach of Other Circuits. 10

II. NEITHER CONGRESS NOR THIS COURT HAS SIGNALED THAT A LACK OF UNIFORMITY ON THIS ISSUE IS ACCEPTABLE. 13

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Dodds v. Cigna Sec., Inc.,
12 F.3d 346 (2d. Cir. 1993) 8

Fujisawa Pharmaceutical Co. v. Kapoor,
115 F.3d 1332 (7th Cir. 1997) 8

In re Exxon Mobil Corp. Sec. Litig.,
387 F. Supp. 2d 407 (D.N.J. 2005) 12

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 13

Law v. Medco Research,
113 F.3d 781 (7th Cir. 1997) 8, 9

LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.,
318 F.3d 148 (2d Cir. 2003) 11

Levitt v. Bear Stearns & Co.,
340 F.3d 94 (2d Cir. 2003) 8

Milman v. Box Hill Sys. Corp.,
72 F. Supp. 2d 220 (S.D.N.Y. 1999) 12

Newman v. Warnaco Group, Inc.,
335 F.3d 187 (2d Cir. 2003) 8

Ritchey v. Horner,
244 F.3d 635 (8th Cir. 2001) 11

Sterlin v. Biomune Sys. Inc.,
154 F.3d 1191 (10th Cir. 1998) 3

Tracinda Corp. v. DaimlerChrysler AG (In re DaimlerChrysler AG Sec. Litig.),
269 F. Supp. 2d 508 (D.Del. 2003) 12

Statutes

28 United States Code § 1658(b) 2, 13

Rules

Supreme Court Rule 10(a) 4

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

The most striking aspect of Betz's Opposition is that it does not deny the existence of a circuit split on the question of when the statute of limitations begins to run on a federal securities fraud claim. To be sure, Betz's version of the split is different, with the Eleventh Circuit starting the clock upon discovery of facts "raising the mere possibility of fraud," the Second, Seventh and Ninth Circuits requiring substantial evidence of defendants' scienter, and the other circuits somewhere in between. But it is still a split and one that Betz concedes would cause different outcomes in the same case in different parts of the country. This concession and Betz's failure to explain away the additional circuit split created by the Ninth Circuit on the issue of what constitutes a reasonable inquiry confirm that cert should be granted. Contrary to Betz's suggestion, neither Congress nor this Court have signaled their acceptance of the current, confused state of affairs.

I. BETZ ACKNOWLEDGES ONE CIRCUIT SPLIT AND FAILS TO EXPLAIN AWAY THE OTHER.

Petitioners demonstrated that the circuits are in conflict over two issues related to the statute of limitations for securities fraud cases.

The first relates to the proper standard for determining when the limitations period begins to run (Pet. § I(A)), and the second relates to what constitutes the "reasonable inquiry" that an investor must undertake once he is put on inquiry notice (Pet. § I(B)). Betz does not dispute that there is a split on the first issue. She merely argues that Petitioners have "exaggerated" the split and that the Ninth Circuit's opinion in this case does nothing to deepen it. Betz is wrong. But, even if she were correct, all parties agree that there is a circuit split that only this Court can resolve. As to the second issue, Betz tries to paper over the split by arguing that the Ninth Circuit has followed "prevailing law," but she fails to show that any circuit has adopted the same standard.

A. Betz Concedes that the Circuits Are Split Over When the Statute of Limitations for Securities Fraud Begins to Run.

1. Betz explicitly acknowledges that the circuits were split even before the Ninth Circuit weighed in on this case.

Betz does not dispute that before the Ninth Circuit's opinion in this case, the circuits followed four approaches to implementing Section 10(b)'s statute of limitations, 28 U.S.C. § 1658(b). *See* Pet. 15-18. Nor does she suggest that the Petition inaccurately portrays those four formulations. To the contrary, Betz makes

concessions that confirm the need for this Court's intervention.

First and foremost, Betz admits that there was (and remains) a clear split between the Eleventh Circuit's formulation (Approach 1) and the formulation of the other circuits (Approaches 2, 3, and 4). In the Eleventh Circuit, as Betz concedes, the statute of limitations would have begun to run "the moment Betz" was put on "inquiry notice." Opp. 12. "[O]ther circuits," in stark contrast, "would give Betz the chance to conduct some reasonable inquiry" before beginning to run the statute of limitations. *Id.*

This concession confirms that this case presents a conflict worthy of this Court's attention because the split is, on its face, dramatic and outcome determinative. Depending on the circumstances, the statute of limitations on a claim could begin to run months or even years earlier in the Eleventh Circuit than in any other circuit. Some circuits have rejected the Eleventh Circuit's position (the most favorable to defendants) on the ground that it encourages investors to file claims prematurely for fear of losing their rights. *Sterlin v. Biomune Sys. Inc.*, 154 F.3d 1191, 1202 (10th Cir. 1998) ("the applicable statute of limitations should not precipitate groundless or premature suits by requiring plaintiffs to file suit before they can discover with the exercise of reasonable diligence the necessary facts to support their claims"). The split is as stark, and as squarely presented, as any imaginable.

Betz does not suggest that the Eleventh Circuit appears likely to abandon its position, or that there is some way, short of this Court's intervention, to resolve the conflict. Indeed, Betz even concedes that "[t]his Court might have some justification for granting a writ" on this very issue, on these very facts, if only "Betz's appeal had arisen in the Eleventh Circuit." Opp. 13. Betz argues that the Court should ignore a clear, acknowledged, and intractable circuit split until a case arises applying the "minority view;" any other case, she contends, is "not the proper vehicle" for resolving the conflict. Opp. 13. This position seems to flow from Betz's mistaken (and repeated) view that what matters most at the cert. stage is whether "[t]he Ninth Circuit can[] be faulted" for taking a particular position—in other words, whether the Ninth Circuit's position is correct. Opp. 13; *see also* Opp. 14-16.

Unsurprisingly, Betz cites no authority for this novel proposition. As Rule 10(a) indicates, cert-worthiness depends upon whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), not on whether that decision represents the "minority view" or a view the Court thinks will prevail.

And while Betz does not explicitly acknowledge the conflict among the groupings of the remaining circuits (*i.e.*, Approaches 2, 3, and 4), she does not deny that the conflict exists. Specifically, Betz concedes that there are "distinctions" in how the various courts of

appeals define the standard, Opp. 11, and that some circuits "have taken a different 'hybrid' approach," Opp. 13. Indeed, the most Betz can bring herself to say is that Petitioners "exaggerate when they call the circuits 'fractured' over inquiry notice," and that the differences among the circuits are "nuanced." Opp. 11. This is hardly a denial that a conflict exists or that it could make a difference in particular cases. And it does not refute the obvious point that anything the Court says in this case will almost certainly affect the standards that are applied in all circuits, thereby affecting numerous cases that fall along the spectrum of existing standards.

2. Betz concedes that other circuits do not follow the Ninth Circuit's scienter-based inquiry notice standard and would have decided this case differently.

The Petition argues that the Ninth Circuit worsened the already-existing circuit conflict discussed above – and created a fifth approach – by holding that direct evidence of a falsehood is insufficient to place a plaintiff on inquiry notice and that inquiry notice is postponed until the plaintiff also learns of specific evidence of defendants' intent to defraud. *See* Pet. 19-20. This conflicts with other circuits, which have uniformly held that a plaintiff is on inquiry notice, as a matter of law, when he learns the defendant's statement was false. *See* Pet. 21-24.

Betz effectively concedes that this conflict exists, acknowledging that the Ninth Circuit adopted a "scienter holding," *see* Opp. 14, while "other circuit court decisions purport to hold that inquiry notice is triggered the moment the plaintiff learns facts that either contradict a promise or contain 'subtler clues' to cast doubt on its truthfulness," Opp. 16. Betz also recognizes that the conflict is significant to this case, arguing that the case was correctly decided under the Ninth Circuit's scienter holding but conceding that application of a possibility-of-fraud standard "arguably could make a difference here." Opp. 12. That should settle the matter.

Oblivious to the significance of these concessions, Betz expends much energy defending the Ninth Circuit's honor and disputing Judge Kozinski's assertion that the Ninth Circuit's approach is at odds with "the rule everywhere in the known universe." Opp. 14 (internal quotation marks and alterations omitted). But Betz's effort to argue that the Ninth Circuit's conclusion is consistent with "a growing body of federal appellate and district court decisions" consisting of a handful of opinions from the Second Circuit and the Seventh Circuit (plus a smattering of district courts purportedly "follow[ing] the lead of the Second, Seventh, and now the Ninth Circuits") are wasted because, of course, the cert-worthiness of this case depends upon whether the Ninth Circuit stands in conflict with *some* circuits, not on whether the Ninth Circuit stands

completely alone. Opp. 14-16. Even if Betz had accurately characterized the opinions of these courts (which, as we demonstrate below, she has not), Betz would have succeeded only in demonstrating that "the Second, Seventh, and now the Ninth Circuits" are at odds with the First, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits, whose contrary opinions are discussed at length in the Petition. *See* Pet. 21-24. In other words, Betz's argument transforms what Chief Judge Kozinski describes as a 9-1 circuit split, *see* App. 35a-36a, into a 7-3 circuit split.

In any event, Betz fails to find support elsewhere in the country for the Ninth Circuit's holding. To support the Ninth Circuit's holding, Betz would have to point to a court of appeals case that has held, as the Ninth Circuit did here, that the plaintiff was on notice that a statement was false, but nevertheless had no obligation even to begin inquiring because she had not yet stumbled across evidence demonstrating that the defendants had intended to deceive her. Betz does not point to a single case that comes close.

Instead, Betz relies mainly on what she describes as a shift in the positions of the Second and the Seventh Circuits "that the fraud must be *probable*, not just possible." Opp. 14. That is nowhere near the same. And neither circuit so much as suggested that they were overruling or disagreeing with prior cases holding that the plaintiff was on notice the moment he learned of a misstatement.

For example, the Second Circuit has used the "probability" standard for 15 years, *see Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d. Cir. 1993), yet holds that facts directly contradicting the defendants' representations *are* sufficient to trigger inquiry notice, *see id.* at 351. The Second Circuit cases Betz invokes, Opp. 14-15, do not suggest that anything more is required, much less specific evidence of scienter. *Levitt v. Bear Stearns & Co.*, 340 F.3d 94 (2d Cir. 2003), does not even address the question of what facts trigger inquiry notice. *Id.* at 102 ("the issue of when Plaintiffs' duty of inquiry arose does not appear to be in dispute."). And *Newman v. Warnaco Group, Inc.*, 335 F.3d 187, 194-95 (2d Cir. 2003), simply held that the lack of a significant stock price reaction to write downs disclosed in a 10-K and a lack of clarity concerning the cause of the write downs indicated the write downs were not storm warnings triggering inquiry notice.

Similarly unhelpful is the language Betz selectively quotes from two Seventh Circuit cases. Opp. 14-15. In *Fujisawa Pharmaceutical Co. v. Kapoor*, 115 F.3d 1332 (7th Cir. 1997), as Chief Judge Kozinski pointed out, the Seventh Circuit *rejected* the position taken by the Ninth Circuit because it would allow plaintiffs to sit on their rights and wait to see how their investment turned out. App. 33a-34a. And in *Law v. Medco Research*, 113 F.3d 781 (7th Cir. 1997), the Seventh Circuit's statement that the statute of limitations did not run until the plaintiff knew or should have known that the defendants "made

a representation that was knowingly false" addressed what an investor's reasonable investigation must be able to find, not what triggers the duty to inquire in the first place. *Id.* at 786 (finding claims were not time-barred as a matter of law where defendants failed to demonstrate that plaintiff could have discovered the facts to support a claim). Thus, contrary to Betz's suggestion, *Law* did not hold, as the Ninth Circuit has, that inquiry notice is not triggered until the plaintiff obtains specific evidence of the defendant's intention to deceive.

Finally, Betz gains no ground by trying to distinguish all the contrary cases based on factual differences. Opp. 17-18. Whatever the facts, each of those circuits held that inquiry notice was triggered as a matter of law when the investor received information directly contradicting representations from the defendant, and several required less. Pet. 21-24. The difference between the Ninth Circuit's result and the results in those cases is attributable to a difference in the legal rule being applied. As Betz acknowledges, the Ninth Circuit has applied a "scienter holding," whereas the other courts did not. Consequently, the Ninth Circuit would have decided each of the cited cases differently.

Thus, it does not matter that those other courts "impose no *per se* rule." Opp. 16. All that matters is that both the results and the logic of those cases are irreconcilable with the result and rationale of the Ninth Circuit here. That is enough to create a circuit conflict.

B. Betz Is Unable to Harmonize the Ninth Circuit's Approach to Reasonable Inquiry with the Approach of Other Circuits.

As Petitioners (and Chief Judge Kozinski) pointed out, the Ninth Circuit strayed further into uncharted territory and created a second circuit split with its alternative holding, which is independently worthy of this Court's consideration. Pet. 24-31. The alternative holding is that even if Betz had been on inquiry notice, summary judgment is improper because a jury could find that it was reasonable for Betz to suspend her inquiry in reliance on Petitioners' assurances that everything would be all right and that they would make her whole. App. 21a-22a. As Petitioners demonstrated, no other circuit has held this, and Betz, despite characterizing the Ninth Circuit's position as "prevailing law" fails to show otherwise.

Betz starts by addressing the wrong split. Petitioners are wrong, she says, because there is no "rift" between circuits following a "categorical rule" against reliance on assurances from the defendant and those following a "not quite so categorical rule." Opp. 21. That is not the split. The split is between these two fundamentally consistent articulations and the Ninth Circuit, which has "staked out a position *diametrically at odds with both permutations* of the rule against relying on a suspected swindler's assurances." Pet. 28.

Betz never returns to the real issue, scarcely addressing the cases Petitioners cited from the First, Second, Third, Seventh, and Eighth Circuits, all of which hold, as a matter of law, that it was unreasonable for the plaintiff in those cases to rely on the self-serving assurances of a suspected swindler to contradict known facts. Pet. 25-28. Ignoring these cases, Betz blithely asserts that the Ninth Circuit's contrary holding is the "prevailing law." But she manages to cite only two circuit cases, neither of which support her argument. Opp. 21-23 citing *LC Capital Partners, L.P. v. Frontier Ins. Group, Inc.*, 318 F.3d 148 (2d Cir. 2003) and *Ritchey v. Horner*, 244 F.3d 635 (8th Cir. 2001).

As Petitioners have already demonstrated, *LC Capital Partners* illustrates the Second Circuit's *rejection* of the Ninth Circuit's alternate holding, not agreement with it. Pet. 27-28. And contrary to Betz's suggestion, *Ritchey* does not involve the central question presented by the Ninth Circuit's alternate holding, which is whether an investor is entitled to delay the running of the limitations period by relying on assurances that are flatly contradicted by the information in front of her. *See Ritchey*, 244 F.3d at 640 (where plaintiff had no information contradicting defendant's assurances, it was not unreasonable as a matter of law to rely on them). Nor do the handful of district court cases on which Betz further relies – including those discussing the so-called "multi-factor" test – hold, as the Ninth Circuit has, that a plaintiff who is *already* on inquiry notice

performs a reasonable inquiry by relying on assurances that confirm the falsity of original representation and are flatly contradicted by the facts known to that plaintiff. *See In re Exxon Mobil Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 418 (D.N.J. 2005) (plaintiffs "may not simply rely on reassurances by management particularly when there are direct contradictions between the defendants' representations and the other materials available to plaintiffs regarding the possibility of fraud."); *Tracinda Corp. v. DaimlerChrysler AG (In re DaimlerChrysler AG Sec. Litig.)*, 269 F. Supp. 2d 508, 516 (D.Del. 2003) (relevant assurances did not confirm falsity of initial representation); *Milman v. Box Hill Sys. Corp.*, 72 F. Supp. 2d 220, 229 (S.D.N.Y. 1999) (considering whether optimistic statements in a 10-Q prevented it from being a storm warning in the first place).

Betz's inability to establish that the Ninth Circuit followed "prevailing law" is not surprising because under the rule followed everywhere else in the country, nothing the Petitioners said could overcome the definitive proof that the alleged promise was false. Pet. 28-29. The Opposition thus confirms that the Ninth Circuit's alternate holding created a second circuit conflict relating to what constitutes the "reasonable inquiry" that an investor must undertake once he is put on inquiry notice.

II. NEITHER CONGRESS NOR THIS COURT HAS SIGNALED THAT A LACK OF UNIFORMITY ON THIS ISSUE IS ACCEPTABLE.

Betz contends that because this Court and Congress have yet to mandate an inquiry notice standard for 28 U.S.C. § 1658(b), they have signaled an intention to accept conflict amongst the circuits. Opp. 10-11. Because of this, Betz argues, the question presented by this case is not cert-worthy.

This nonsensical proposition cannot be squared with what both branches *have* said about Section 10(b)'s statute of limitations. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the Court adopted, for the first time, a uniform limitations period for Section 10(b) claims, and in 28 U.S.C. § 1658(b), Congress ratified that judgment. It defies logic to suggest that both branches took these steps – which were designed to apply the same limitations period nationally – while simultaneously accepting a circuit split. This case is cert-worthy precisely because Congress and the Court have not yet spoken on the issue.

CONCLUSION

For the foregoing reasons, this Court should

grant a writ of certiorari.

Respectfully submitted,

Sara B. Brody
Alexander M.R. Lyon
Colin E. Kelley
HELLER EHRMAN LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

E. Joshua Rosenkranz
Counsel of Record
HELLER EHRMAN LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 832-8300

Counsel for Petitioners

July 10, 2008

AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
MAR 3 2008
OFFICE OF THE CLERK

No. 07-1489

In the Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., ET AL.,
PETITIONERS

v.

HEIDE BETZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ELENA KAGAN
Solicitor General
Counsel of Record

MALCOLM L. STEWART
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID M. BECKER
General Counsel

MARK D. CAHN
Deputy General Counsel

MARK PENNINGTON
Assistant General Counsel

DAVID LISITZA
Senior Counsel
Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

The federal statute of limitations for private securities-fraud claims provides that a plaintiff must file suit within two years after "the discovery of the facts constituting the violation." 28 U.S.C. 1658(b). The lower courts have uniformly construed the term "discovery" in that provision to refer to actual or constructive discovery. Under that interpretation, Section 1658(b) bars a suit when the complaint is filed more than two years after the time at which the plaintiff, in the exercise of reasonable diligence, ought to have discovered the "facts constituting the violation." The lower courts have used the term "inquiry notice" to describe the point at which the plaintiff was sufficiently alerted to the possibility of wrongdoing that a reasonably diligent investor in his position would have undertaken further investigation. The questions presented are as follows:

1. Whether a potential plaintiff is on "inquiry notice" regarding a claim of securities fraud when he has reason to suspect that the defendant has made a false statement, even if the victim has no reason to suspect that the defendant made the misstatement with the scienter necessary to constitute a violation of the securities laws.

2. Whether an investor who has been placed on "inquiry notice" may reasonably delay further investigation of the defendant's possible fraud on the basis of assurances by the defendant.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 1
Discussion 5
I. For purposes of determining when a reasonably diligent investor would have discovered the "facts constituting the violation," a potential plaintiff is placed on "inquiry notice" regarding a potential claim of securities fraud only once he has reason to suspect that a misrepresentation or omission was made with scienter 6
A. The court of appeals stated the correct legal standards for applying the limitations period, but misapplied those standards to the facts of this case 6
B. Although the courts of appeals are divided in various respects concerning application of "inquiry notice" to securities-fraud claims, resolution of those conflicts is unnecessary to the proper disposition of this case 13
II. The question whether respondent reasonably delayed filing suit due to petitioners' assurances does not warrant the Court's review 19
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Addeo v. *Braver*, 956 F. Supp. 443 (S.D.N.Y. 1997) 3
Alaska Elec. Pension Fund v. *Pharmacia Corp.*, 554 F.3d 342 (3d Cir. 2009) 17

Cases—Continued: Page

Arneil v. *Ramsey*, 550 F.2d 774 (2d Cir. 1977) 15
Brumbraugh v. *Princeton Partners*, 985 F.2d 157 (4th Cir. 1993) 14
Commissioner v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152 (1993) 7
Cooke v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993) 14
Cooperativa de Ahorro y Credito Aguada v. *Kidder, Peabody & Co.*, 129 F.3d 222 (1st Cir. 1997) 13, 20
Dodds v. *Cigna Sec., Inc.*, 12 F.3d 346 (2d Cir. 1993), cert. denied, 511 U.S. 1019 (1994) 15, 17
Dura Pharm., Inc. v. *Broudo*, 544 U.S. 336 (2005) 11
Edgington v. *Fitzmaurice*, 29 Ch. D. 459 (1885) 11
Fujisawa Pharm. Co. v. *Kapoor*, 115 F.3d 1332 (7th Cir. 1997) 15, 16, 17
Great Rivers Coop. v. *Farmland Indus., Inc.*, 120 F.3d 893 (8th Cir. 1997) 14
Holmberg v. *Armbrecht*, 327 U.S. 392 (1946) 7
Jensen v. *Snellings*, 841 F.2d 600 (5th Cir. 1988) 14
Kirby v. *Lake Shore & Mich. S. R.R.*, 120 U.S. 130 (1887) 7
Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 6, 7, 10, 15
Law v. *Medco Research, Inc.*, 113 F.3d 781 (7th Cir. 1997) 12, 18
LC Capital Partners, LP v. *Frontier Ins. Group, Inc.*, 318 F.3d 148 (2d Cir. 2003) 14, 15, 19
Maggio v. *Gerard Freezer & Ice Co.*, 824 F.2d 123 (1st Cir. 1987) 17

Cases—Continued: Page

Matheus v. *Kidder, Peabody & Co.*, 260 F.3d 239 (3d Cir. 2001) 13, 15, 20

Merck & Co., Sec., Derivative & "ERISA" Litig., In re, 543 F.3d 150 (3d Cir. 2008), petition for cert. pending, No. 08-905 (filed Jan. 15, 2009) 17, 18

New England Health Care Employees Pension Fund v. *Ernst & Young, LLP*, 336 F.3d 495 (6th Cir. 2003), cert. denied, 540 U.S. 1183 (2004) 14

Ritchey v. *Horner*, 244 F.3d 635 (8th Cir. 2001) 19

Staehr v. *Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406 (2d Cir. 2008) 15

Sterlin v. *Biomune Sys.*, 154 F.3d 1191 (10th Cir. 1998) 14, 17

Tellabs, Inc. v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) 9, 11

Tello v. *Dean Witter Reynolds, Inc.*, 410 F.3d 1275 (11th Cir. 2005) 16

Theoharous v. *Fong*, 256 F.3d 1219 (11th Cir. 2001) 17

Young v. *Lepone*, 305 F.3d 1 (1st Cir. 2002) 14

Statutes, regulation and rule:

Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 801 6

Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 9

Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*:

15 U.S.C. 78j(b) (§ 10(b)) 2

15 U.S.C. 78u-4(b)(2) 9

28 U.S.C. 1658(b) ..... *passim*

Statutes, regulation and rule—Continued: Page

28 U.S.C. 1658(b)(1) 10
N.Y. Code Civ. P. § 91 (Voorhees 4th ed.) 7
17 C.F.R. 240.10b-5 (SEC Rule 10b-5) 2, 11
Fed. R. Civ. P. 9(b) 9

In the Supreme Court of the United States

No. 07-1489

TRAINER WORTHAM & COMPANY, INC., ET AL., PETITIONERS

v.

HEIDE BETZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the Court should deny the petition for a writ of certiorari.

STATEMENT

1. Respondent, a retired art dealer, invested $2.2 million with petitioner Trainer Wortham & Company, Inc., an investment management company. Pet. App. 4a. Respondent alleges that she was induced to make that investment by petitioner's statement that she would be able to "withdraw $15,000 per month from her portfolio, for living expenses, without touching the $2.2 million in principal."

Ibid.[1] Respondent opened the account in June 1999, and in February 2000 she received the first of many statements showing "an account value below her initial investment of $2.2 million." *Id.* at 5a. By March 2001 the balance had declined to $848,000. *Ibid.* Respondent spoke with a firm employee at that time about the decline and was told that the decrease was attributable to the monthly withdrawals, but "that the shortfall was temporary, that the market would recover, and that in a year or less her account balance would be back to $2.2 million." *Ibid.*

After the balance continued to decline, respondent met again with petitioners' representatives. Pet. App. 5a. In May 2002, respondent was told that petitioner's president "was meeting with other principals and attorneys" and that she "should be patient with them and not take any legal action." *Ibid.* In June 2002, however, respondent was advised that petitioner was "not going to do anything at all" regarding the account's declining value. *Id.* at 5a-6a.

2. On July 11, 2003, respondent filed suit in federal district court, alleging violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5. Pet. App. 6a. The district court granted summary judgment in favor of petitioners (*id.* at 88a-108a), holding respondent's claim barred by the applicable statute of limitations, which provides that private actions under Section 10(b) must be filed "not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. 1658(b).

---

[1] Petitioner Trainer Wortham is an investment subsidiary of petitioner First Republic Bank. Pet. App. 4a. Respondent also sued First Republic Bank and two individuals. *Id.* at 6a. References to "petitioner" in the text are to Trainer Wortham.

In applying Section 1658(b) to the facts viewed in the light most favorable to respondent, the district court explained that a potential securities-fraud plaintiff is on "inquiry notice" regarding a possible claim once there are "sufficient storm warnings to alert a reasonable person to the [probability] that there were either misleading statements or significant omissions involved in the sale of the [securities]." Pet. App. 100a (brackets in original) (quoting *Addeo* v. *Braver*, 956 F. Supp. 443, 449 (S.D.N.Y. 1997)). The court concluded that respondent had been placed on "inquiry notice" in February 2000, when she "received the first of thirty account statements * * * showing that her portfolio had declined below the value of her original $2.2 million investment." *Ibid.* The court concluded that petitioners' assurances "did not toll the statute of limitations," and that respondent's claims had accrued no later than March 2001 and were therefore time-barred. *Id.* at 103a.

3. The court of appeals reversed. Pet. App. 1a-23a. The court explained that a "plaintiff is on inquiry notice when there exists sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further." *Id.* at 16a. The court further explained that, "[o]nce a plaintiff has inquiry notice, we ask when the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud. The answer to that second question tells us when the statute of limitations began to run." *Ibid.*

Applying that test, the court found triable questions of fact as to (1) when respondent had reasonable grounds to suspect fraud, Pet. App. 20a-21a, and (2) when, "in the exercise of reasonable diligence, [she] should have discovered the facts constituting the alleged fraud," *id.* at 21a-22a. The court concluded that neither respondent's account statements nor petitioners' acknowledgments of problems with

her account established "inquiry notice" as a matter of law because they "provided no evidence that the defendants had intentionally or deliberately and recklessly misled" respondent, as would be necessary "to state a claim for securities fraud." *Id.* at 21a. The court of appeals further held that, even assuming respondent had been placed on "inquiry notice," a triable issue of fact remained as to whether respondent, "in the exercise of reasonable diligence, should have discovered the facts constituting the alleged violation." *Ibid.*; see *id.* at 21a-22a. The court explained that respondent had "questioned [petitioners] about her account and [petitioners] assured her that they would take care of any problems and asked her not to file suit." *Id.* at 22a.

4. The court of appeals denied rehearing en banc, with three judges dissenting. Pet. App. 25a-39a. In the dissenting judges' view, "the statute of limitations starts to run when plaintiff is on 'inquiry notice,'" *id.* at 30a, which those judges analogized to "'storm warnings'—hints that something may be amiss," *id.* at 36a. On the facts of this case, those judges would have held that "[s]ince [respondent's] theory of fraud is that she was told her money would not be put at risk, she had at least inquiry notice that someone had lied to her when she saw her principal melt away." *Id.* at 31a.

With respect to whether a defendant's assurances could delay a diligent investor's discovery of actionable fraud, the dissenting judges acknowledged that "outright lies" that prevent an investor "from discovering *facts known only to the defendant*" might delay the commencement of the limitations period. Pet. App. 37a. Those judges concluded, however, that no such deception had occurred in this case. *Id.* at 38a. They explained that, although petitioners had predicted that respondent "would get her money back when

the stock market recovered," those statements "conceal[ed] nothing," but rather "confirm[ed] that [respondent's] investment is subject to market fluctuations and is therefore not free from risk." *Ibid.*

DISCUSSION

Petitioners contend (Pet. 15-24) that this Court should grant certiorari to resolve a multi-dimensional conflict among the courts of appeals with respect to the proper application of the two-year limitations period set forth in 28 U.S.C. 1658(b). The courts of appeals generally agree that the two-year period does not begin to run until the plaintiff (1) is put on "inquiry notice" of possible wrongdoing through information that would induce a reasonably diligent investor to undertake an investigation, and (2) has an opportunity to investigate in order to confirm or dispel those suspicions. Although the courts of appeals diverge in certain respects in their application of that general framework, some of those areas of disagreement are not implicated by this case.

In the government's view, the court of appeals articulated the correct legal standards, but misapplied those standards to the facts of this case. In light of the nature of the alleged fraud, the information known to respondent once her account balance declined precipitously, and petitioners' confirmation that the investment in risky equities was not a mistake, the court should have held that respondent had *actual* knowledge of the "facts constituting the violation" more than two years before she filed her complaint. Correction of that fact-specific error, however, is not itself a sufficient reason for this Court to grant review. And if the Court were to grant certiorari and reverse the court of appeals on the ground that respondent had actual notice of the relevant facts more than two years before she filed suit,

its decision would leave the relevant circuit conflicts unresolved.

Petitioners also contend (Pet. 24-31) that the court of appeals erred in holding that, even if respondent was on "inquiry notice," a triable issue existed on whether a reasonable investor would have delayed further investigation on the basis of petitioners' assurances. But there is no conflict among the courts of appeals on the legal standard relevant to this contention, and the Ninth Circuit's resolution of the issue on the facts of this case does not warrant this Court's review.

I. FOR PURPOSES OF DETERMINING WHEN A REASONABLY DILIGENT INVESTOR WOULD HAVE DISCOVERED THE "FACTS CONSTITUTING THE VIOLATION," A POTENTIAL PLAINTIFF IS PLACED ON "INQUIRY NOTICE" REGARDING A POTENTIAL CLAIM OF SECURITIES FRAUD ONLY ONCE HE HAS REASON TO SUSPECT THAT A MISREPRESENTATION OR OMISSION WAS MADE WITH SCIENTER

A. The Court Of Appeals Stated The Correct Legal Standards For Applying The Limitations Period, But Misapplied Those Standards To The Facts Of This Case

1. The court of appeals applied the correct legal standards for determining whether a claim of securities fraud is barred by the two-year limitations period contained in 28 U.S.C. 1658(b). That statute provides that a claim of securities fraud must be brought within the earlier of "2 years after discovery of the facts constituting the violation" or "5 years after such violation." *Ibid.* Congress adopted Section 1658(b) in the Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 804, 116 Stat. 801, in response to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991)

(*Lampf*). In *Lampf*, the Court held that securities-fraud claims were governed by a uniform federal limitations period and must be brought within the earlier of one year "after discovery of the facts constituting the violation" or three years of the violation. *Id.* at 363. Although Congress subsequently extended the relevant periods of limitation and repose to two and five years respectively, it retained *Lampf*'s trigger for the limitations period to begin running—"discovery of the facts constituting the violation." 28 U.S.C. 1658(b).

When Congress enacted Section 1658(b), it was well-established that a limitations period triggered by "discovery" of the alleged violation will commence to run either when the plaintiff *actually* discovers the relevant facts or at the time of *constructive* discovery—*i.e.*, the time when the plaintiff would have discovered the violation if he had made reasonably diligent inquiries. See Pet. App. 12a (citing cases, including pre-2002 cases). This Court has likewise construed other federal statutes of limitations, including statutes with language resembling that of Section 1658(b), to encompass both actual and constructive discovery. *E.g.*, *Kirby* v. *Lake Shore & Mich. S. R.R.*, 120 U.S. 130, 134-135, 138 (1887) (construing statute providing that action for fraud is "not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud" to mean that the statute did not run "until after such fraud was or should, with due diligence, have been discovered") (quoting N.Y. Code Civ. P. § 91, at 86 (Voorhees 4th ed.)); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). Congress can therefore be presumed to have intended that the same construction be given to Section 1658(b). See, *e.g.*, *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993).

As the court of appeals held (Pet. App. 16a), when the two-year limitations period is triggered by constructive rather than actual discovery of the securities violation, the court must undertake a two-step analysis to calculate when the limitations period began to run. First, the court must identify the point at which the plaintiff received information sufficiently suggestive of possible wrongdoing that a reasonable investor would have undertaken further investigation to determine whether he had a legal claim. *Ibid.* Consistent with the terminology used by other lower courts, the Ninth Circuit used the term "inquiry notice" to describe that point. *Ibid.* Second, the court must ascertain at what time "the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the alleged fraud." *Ibid.* It is "[t]he answer to that second question" which identifies the date on which "the statute of limitations began to run." *Ibid.*

The court of appeals was also correct in holding that an investor is not placed on "inquiry notice" until he is apprised of information suggesting that the defendant acted with scienter. The ultimate purpose of the two-step inquiry is to identify the point at which a reasonably diligent investor should have discovered "the facts constituting the violation." 28 U.S.C. 1658(b). Because scienter is an essential element of a securities-fraud claim, there is no logical basis for concluding that a reasonably diligent investor would have undertaken further inquiry if the facts before him did not suggest that the defendant had acted with the requisite state of mind.

2. The judges who dissented from the denial of rehearing en banc would have held that "the statute of limitations starts to run when plaintiff is on 'inquiry notice,' that is, when a reasonable investor in plaintiff's position would suspect he had been defrauded." Pet. App. 30a-31a. Those

judges also suggested that a plaintiff may be placed on "inquiry notice" when he receives information suggesting that the defendant has made a misstatement, even when the available information provides no reason to believe that the defendant acted with scienter. See *id.* at 32a-34a. The court of appeals correctly rejected those propositions.

a. The dissenting judges characterized "inquiry notice" as "hints that something may be amiss so that the investor needs to start asking some hard questions." Pet. App. 36a. Section 1658(b)'s two-year limitations period begins to run, however, not when a reasonable investor would become suspicious or commence further investigation, but rather upon "discovery of the facts constituting the violation." The phrase "facts constituting the violation" is naturally understood to refer to facts that, if pleaded in a securities-fraud complaint, would be sufficient to survive a motion to dismiss.[2] Even in a case involving constructive discovery, where the court must determine when a reasonably diligent investor *would have* discovered the relevant facts, the point

---

[2] Like all plaintiffs asserting claims of fraud, plaintiffs in securities-fraud cases must allege the circumstances constituting the fraud with specificity. Fed. R. Civ. P. 9(b). In addition, under the pleading standards established by the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, securities-fraud plaintiffs who sue as class representatives are required to "state with particularity facts giving rise to a strong inference that the defendant acted with scienter." 15 U.S.C. 78u-4(b)(2). A primary purpose of both of these heightened pleading requirements is to make it possible to distinguish between factually well-founded cases and frivolous ones at the pleading stage. See, *e.g.*, *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007). These pleading requirements highlight the difference between facts that might give rise to a *suspicion* of fraud and thus cause a reasonable investor to undertake further inquiry (the facts at "inquiry notice") and the facts that must be alleged in a complaint in order to survive a motion to dismiss (the facts "constituting a violation").

at which a diligent investigation would have borne fruit will inevitably be later than the point at which the investigation should have commenced. Cf. Pet. App. 16a. There is consequently no textual basis for the dissenting judges' view that the two-year limitations period begins to run when the plaintiff is placed on "inquiry notice."[3]

The dissenting judges suggested that, under the panel's approach, a "plaintiff has no incentive to bring suit promptly," but rather could draft a complaint on the day he discovers the facts constituting the violation and wait two years before filing it. Pet. App. 34a. The statutory language, however, unambiguously permits a plaintiff to file suit up to "2 years after the discovery of the facts constituting the violation." 28 U.S.C. 1658(b)(1). If an issuer of stock disclosed a previously unsuspected fraud, purchasers would immediately have all the information necessary to file suit, but Section 1658(b) would still allow them two years to file a timely complaint. Because Section 1658(b) incorporates a constructive-discovery rule, a potential plaintiff who has been placed on "inquiry notice" cannot delay the commencement of the limitations period simply by failing to

---

[3] Where even a diligent investigation would last more than two years, the dissenting judges' approach—under which Section 1658(b)'s limitations period would begin to run upon "inquiry notice," when the plaintiff should commence his investigation—would result in the limitations period expiring before the plaintiff knew or should have known facts sufficient to survive a motion to dismiss. In *Lampf*, however, this Court held that the limitations period applicable to private securities actions is not subject to equitable tolling because the period "by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary." 501 U.S. at 363 (emphasis added). That analysis presumes that the two-year limitations period (unlike the five-year "period of repose" that "serve[s] as a cutoff" for all claims, see *ibid.*) cannot bar claims before a reasonably diligent plaintiff could learn the facts necessary to assert them.

conduct a diligent investigation. But so long as suit is filed within two years after the plaintiff knew or should have known the "facts constituting the violation," it is timely under the plain terms of the statute.

b. Under Section 10b-5, scienter is a critical element of the "facts constituting the violation." A misrepresentation is not actionable under Section 10b-5 unless "the defendant acted with scienter." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 (2007). See *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 341 (2005). And a crucial fact that distinguishes "fraud" from other untruths is that the defendant acts with scienter (or at least with some degree of culpability). Although scienter must often be established circumstantially, it is nonetheless a "fact" that must be pleaded and proved. Cf. *Edgington* v. *Fitzmaurice*, 29 Ch. D. 459, 483 (1885) ("[T]he state of a man's mind is as much a fact as the state of his digestion.").

The "inquiry notice" concept serves to identify the point at which a reasonably diligent investor would suspect under all the facts and circumstances that he has suffered a violation of his legal rights and would therefore undertake further investigation. When an investor has reason to suspect that he was previously given inaccurate securities-related information, but has no reasonable basis to suppose that the misstatement was anything other than an innocent mistake, his natural inference will be that no actionable fraud has occurred. Under those circumstances, there is no logical basis for concluding that a reasonable investor would devote time or resources to investigating a potential legal claim for which an essential element appears to be lacking.

To be sure, an innocent mistake may be inherently unlikely, so that information giving rise to a suspicion of falsehood will without more give rise to suspicion of fraud. In particular, when a "representation is false for reasons likely

to have been within the knowledge of the company when making it, investors upon learning of the falsity should smell the possibility of fraud." *Law* v. *Medco Research, Inc.*, 113 F.3d 781, 785 (7th Cir. 1997). But that is not the case when the inaccurate statement concerns information that is external to the declarant or that might "have arisen after the representation was made." *Ibid.* In the latter case, such as when a prediction about the future does not come to pass, facts demonstrating the original statement to have been inaccurate may give no indication that the statement was fraudulent when made.

3. Although the court of appeals correctly stated the legal standards for determining whether a securities-fraud complaint was filed within two years after constructive discovery of the alleged fraud, the court erred in applying Section 1658(b) to the facts of this case. Respondent alleged that petitioners had falsely told her that she would receive a fixed monthly return on her investment and that her principal would not be reduced. See Pet. App. 4a. Yet in February 2000, more than three years before filing suit, respondent received a statement showing "an account value below her initial investment," and by March 2001 the balance was down by more than 60%. *Id.* at 5a. Petitioners' alleged representations that respondent's money would be invested in a way that would preserve the principal while generating $15,000 in monthly income were entirely inconsistent with the drastic drop in principal respondent experienced. And because petitioners' intentions about how they would invest the assets were entirely within petitioners' knowledge when they made the statements, a reasonable investor would have suspected, after witnessing the investments' decline, that the representations were knowingly false when made. See *Law*, 113 F.3d at 785; see also *Mathews* v. *Kidder, Peabody & Co.*, 260 F.3d 239, 252-255 (3d

Cir. 2001); *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 129 F.3d 222, 224 (1st Cir. 1997).

In March 2001, when respondent contacted the company about the declining balance, she was not told that there had been some sort of mistake, clerical error, or unexpected development. Rather, she was told that the shortfall was attributable to her monthly withdrawals, that the decline was temporary, and that the balance would increase to the initial level of investment when the market recovered. Pet. App. 5a. That response confirmed that petitioners had, apparently intentionally, invested respondent's assets in risky equities rather than investment vehicles that would preserve her principal as petitioners had allegedly promised. Thus, more than two years before respondent filed suit in July 2003, she had actual knowledge of the facts constituting the fraud alleged in her complaint.

B. Although The Courts Of Appeals Are Divided In Various Respects Concerning Application Of "Inquiry Notice" To Securities-Fraud Claims, Resolution Of Those Conflicts Is Unnecessary To The Proper Disposition Of This Case

As previously noted, see p. 7, *supra*, there is a broad consensus among the courts of appeals that Section 1658(b) incorporates a rule of constructive discovery and an attendant concept of "inquiry notice." There is, moreover, general agreement that the plaintiff must have a sufficient opportunity to conduct an investigation that would enable him to discover the full facts necessary to file a securities-fraud complaint. In significant respects, however, the courts of appeal have been inconsistent in their application of those principles. Those areas of disagreement include the question whether "inquiry notice" requires information suggesting that a defendant's possible misstatement was made with scienter. This case, however, provides an unsuitable vehicle

for clarification of the governing legal rules because its proper disposition does not require the resolution of those disputed questions.

1. Although all the courts of appeals apply some variant of the two-step inquiry used by the Ninth Circuit here, see Pet. App. 15a-17a, asking both whether the plaintiff was placed on "inquiry notice" and whether a diligent investigation would have revealed the violation of law, there are significant differences in their approaches. Most circuits apply the same two-step inquiry the court of appeals adopted here. See *New England Health Care Employees Pension Fund* v. *Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003), cert. denied 540 U.S. 1183 (2004); *Young* v. *Lepone*, 305 F.3d 1, 9-10 (1st Cir. 2002); *Sterlin* v. *Biomune Sys.*, 154 F.3d 1191, 1201 (10th Cir. 1998); *Great Rivers Coop.* v. *Farmland Indus., Inc.*, 120 F.3d 893, 896, 898 (8th Cir. 1997); *Jensen* v. *Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).[4]

The Second and Third Circuits apply the same two-step approach as the majority rule, but only if the plaintiff did, in fact, undertake an investigation after being put on "inquiry notice." *LC Capital Partners, LP* v. *Frontier Ins. Group, Inc.*, 318 F.3d 148, 154 (2d Cir. 2003) ("[I]f the investor makes some inquiry once the duty arises, we will impute knowledge of what an investor 'in the exercise of reasonable diligence, should have discovered' concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the

---

[4] Although the Fourth Circuit has suggested that the limitations period begins to run on "inquiry notice," even though such notice does not itself provide enough facts to file a lawsuit, see *Brumbraugh* v. *Princeton Partners*, 985 F.2d 157, 162-163 (1993), the court alternatively has stated the standard in a manner consistent with the majority rule, see *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256, 1263 (1993).

fraud.") (internal citation omitted). By contrast, "[i]f the investor makes no inquiry," knowledge of the facts constituting the violation "will be imputed as of the date the duty [to investigate] arose." *Ibid.*; see *Mathews*, 260 F.3d at 255 (3d Cir.) ("because by early 1990, there were numerous storm warnings that the Appellants failed to adequately investigate, their claims accrued, and the limitations period began to run, on that date"). The practical effect of that approach is to treat the two-year limitations period as starting to run when the plaintiff is placed on "inquiry notice," but to apply "[e]quitable tolling [to] stay the running of the statute of limitations * * * so long as the plaintiff has 'exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud.'" See *Dodds* v. *Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993) (quoting *Arneil* v. *Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977)), cert. denied, 511 U.S. 1019 (1994); *Staehr* v. *Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 426 (2d Cir. 2008) (quoting *Dodds*, 12 F.3d at 350). That approach is inconsistent both with the text of Section 1658(b) and with this Court's recognition in *Lampf* that "tolling [is] unnecessary" in securities-fraud cases because the limitations "period, by its terms, begins after discovery of the facts constituting the violation." 501 U.S. at 363; see note 3, *supra*.

The Seventh and Eleventh Circuits frame the analysis differently, but like the Second Circuit's tolling approach, their analysis focuses on how much time the plaintiff would have needed to discover facts necessary to file a complaint. Under this approach, "the statute of limitations * * * begins to run * * * not when the fraud is discovered, but when * * * the plaintiff learns, or should have learned through the exercise of ordinary diligence * * * enough facts to enable him by [reasonable] further investigation * * * to sue within" the limitations period. *Fujisawa*

Pharm. Co. v. *Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997) (*Fujisawa*). See *Tello* v. *Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1284 (11th Cir. 2005) (noting Eleventh Circuit's adoption of Seventh Circuit's standard). In other words, under those courts' standard, the limitations period starts to run upon "inquiry notice," but what constitutes "inquiry notice" is determined based on "how easy it is to obtain the necessary proof by a diligent investigation." *Fujisawa*, 115 F.3d at 1335. That approach again cannot be squared with the statutory language, which allows a plaintiff to file suit up to "2 years after discovery of the facts constituting the violation." 28 U.S.C. 1658(b).

The result in this case would not be affected by applying either the tolling approach followed in the Second Circuit or the Seventh Circuit's method of calculating when the statute begins to run. Because respondent did undertake some inquiry, the Second Circuit would apply the majority rule in this case. Thus, this case does not present an opportunity to explore the difference between the Second Circuit approach and the majority rule. Neither would the difference between the Seventh Circuit approach and the majority rule affect the outcome of this case. If (as the court of appeals held, see Pet. App. 20a) a jury could permissibly find that "a reasonable investor in [petitioner's] shoes would not have initiated further inquiry before July 11, 2001," then respondent's suit would be timely under the Seventh Circuit's approach also. By contrast, if respondent had actual knowledge of the facts constituting the alleged fraud by March 2001, see pp. 12-13 , *supra*, then her suit is untimely under either the majority rule or the Seventh Circuit's approach. Because the resolution of this case turns on an assessment of the particular facts involved rather than on the choice between competing legal standards, it

would not provide the Court an appropriate opportunity to explore the dissimilarities among the various approaches.

2. Petitioner also identifies (Pet. 19-20) a second circuit conflict regarding whether (as the court of appeals held, see Pet. App. 21a) a plaintiff is on "inquiry notice" only when the facts suggest that the defendant acted with scienter, or whether (as petitioner contends, see Pet. 19) facts suggesting that "a statement or promise was false" are always sufficient. Like the Ninth Circuit in this case, the Third Circuit has squarely held that "inquiry notice, in securities fraud suits, requires storm warnings indicating that defendants acted with scienter." *Alaska Elec. Pension Fund* v. *Pharmacia Corp.*, 554 F.3d 342, 348 (2009) (citing *In re Merck & Co. Sec., Derivative & "ERISA" Litig.*, 543 F.3d 150 (3d Cir. 2008) (*Merck*), petition for cert. pending, No. 08-905 (filed Jan. 15, 2009)).[5] By contrast, the Tenth and Eleventh Circuits appear to have held that suspicion of scienter is not required to constitute "inquiry notice." See *Sterlin*, 154 F.3d at 1196, 1203; *Theoharous* v. *Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001) (citing *Sterlin*).

---

[5] The Second Circuit has characterized "inquiry notice" as information that "would suggest * * * the probability that [the investor] has been defrauded," *Dodds*, 12 F.3d at 350, and the First Circuit has described "inquiry notice" as notice of facts that "would have alerted a reasonable investor to the possibility of fraudulent conduct." *Maggio* v. *Gerard Freezer & Ice Co.*, 824 F.2d 123, 128 (1987). The Seventh Circuit has explained that, although inquiry notice "can fall short of actual proof of fraud," nonetheless "[t]he facts constituting [inquiry] notice must be sufficiently probative of fraud" to permit the plaintiff to investigate and file a complaint within the statutory period. *Fujisawa*, 115 F.3d at 1335. Because the term "fraud" and its variants suggest a scienter component, those statements are generally supportive of the view that "inquiry notice" requires information that raises a suspicion of deliberate wrongdoing. The First, Second, and Seventh Circuits have not squarely addressed that question, however.

But this conflict on the question whether "inquiry notice" requires facts suggesting scienter or only falsity often will be utterly irrelevant—and is so in this case. In circumstances in which an innocent mistake is unlikely, as when an alleged misstatement concerns a matter within the speaker's knowledge or control, evidence of falsity will suggest scienter and therefore place an investor on "inquiry notice." See, *e.g.*, *Law*, 113 F.3d at 785; pp. 11-12, *supra*. As discussed above, this is such a case because petitioners were presumably aware that respondent's assets had not been invested conservatively to preserve her principal. Thus, as with the other circuit conflict described above, the Court would have no need to determine whether information suggesting scienter is necessary to place an investor on "inquiry notice."[6]

---

[6] The petition for a writ of certiorari in *Merck* might present an opportunity for the Court to explore the various approaches in a case in which the differences could affect the outcome. The suit in *Merck* was filed in November 2003, 543 F.3d at 153, and the statements at issue in that case concerned the defendant's belief that certain trial results were the result of unique advantages of a comparator drug, rather than any risk associated with the defendant's drug, see *id.* at 167-172. While recognizing that doubts as to the accuracy of that explanation of the results had been raised as early as the Fall of 2001, the Third Circuit concluded that the plaintiffs had not been placed on "inquiry notice" until 2003 because information suggesting the insincerity of the defendant's proffered explanation did not emerge until that time. See *id.* at 172. The court therefore did not consider whether the plaintiffs had undertaken a diligent inquiry or when such an inquiry would have discovered the violation of law. See *ibid.* By contrast, if the court had treated information suggesting falsity as sufficient to place the plaintiffs on "inquiry notice," and had applied its preexisting rule (also adopted by the Second Circuit, see pp. 14-15, *supra*) that the two-year limitations period runs from inquiry notice if the plaintiff fails to conduct an investigation, the court might have held the suit to be untimely. See *Merck*, 543 F.3d at 178 (Roth, J., dissenting).

II. THE QUESTION WHETHER RESPONDENT REASONABLY DELAYED FILING SUIT DUE TO PETITIONERS' ASSURANCES DOES NOT WARRANT THE COURT'S REVIEW

Petitioners also contend (Pet. 24-31) that the Court should grant certiorari to decide whether, assuming that respondent was placed on "inquiry notice," petitioners' assurances were sufficient to delay the running of Section 1658(b)'s limitations period. Noting respondent's allegation that she had received "specific assurances from the president of Trainer Wortham that her account problems would be resolved and that she should forego suit," Pet. App. 19a n.4, the court of appeals held that those assurances "give rise to a fact issue which makes summary judgment inappropriate," *id.* at 22a. Petitioners object to this holding.

But petitioners can cite no decision holding that it is "categorically unreasonable" (Pet. 25) for an investor who has been given reason to suspect possible fraud to suspend his investigation based on assurances by the suspected wrongdoer that an innocent explanation for the suspicious circumstances exists. Indeed, it strains credulity to suggest that *nothing* a suspected wrongdoer could ever say would make it reasonable for a plaintiff to terminate his inquiry or investigation. Rather, the courts of appeals that have addressed this question—including the Ninth Circuit—have recognized that the significance for limitations purposes of a suspected defrauder's assurances is not determined by categorical rules, but is instead based on an analysis of the particular circumstances of each case. *E.g.*, Pet. App. 17a; *LC Capital Partners*, 318 F.3d at 155; *Ritchey* v. *Horner*, 244 F.3d 635, 640-641 (8th Cir. 2001).

The decisions on which petitioners rely do not endorse the blanket rule that they advocate, but simply hold that the particular assurances given in those cases would not have induced reasonable investors to terminate their inqui-

ries. The Third Circuit in *Mathews* recognized that the reasonableness of reliance can depend on the "magnitude of the existing storm warnings" which, *"[i]n this case* * * * were massive and extremely threatening." 260 F.3d at 252-255 (emphasis added). Similarly, in holding that the plaintiff in *Cooperativa de Ahorro* had unreasonably relied on "bland generalities about market fluctuations and repeated reassurances that the investment was safe," the First Circuit did not adopt a categorical rule but simply stated that the particular facts of the case "do[] not seem sufficient to dispel a reasonable suspicion of fraud." 129 F.3d at 224-225.

The United States agrees with petitioners that the alleged assurances on which the court of appeals relied in this case did not establish a jury question on whether respondent's suit was timely filed. Those assurances were not given until May 2002, see Pet. App. 5a, after respondent had actual knowledge of the alleged fraud and the two-year limitations period had begun to run. In addition, the statements at issue did not purport to assure respondent that no prior misrepresentations had occurred or that any such misrepresentations were inadvertent, but simply promised that respondent's "account problems would be resolved." *Id.* at 19a n.4. But while the court of appeals erred in treating those assurances as sufficient to create a jury question on the timeliness of respondent's complaint, that fact-specific error does not warrant this Court's review, particularly because the Ninth Circuit relied on the assurances only as an alternative ground for reversing the district court's grant of summary judgment to petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

MALCOLM L. STEWART
Deputy Solicitor General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

DAVID M. BECKER
General Counsel

MARK D. CAHN
Deputy General Counsel

MARK PENNINGTON
Assistant General Counsel

DAVID LISITZA
Senior Counsel
Securities and Exchange Commission

APRIL 2009

AMICUS CURIAE BRIEF

No. 07-1489

FILED
JUN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

TRAINER WORTHAM & COMPANY, INC., *et al.*,
Petitioners,

v.

HEIDE BETZ

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for amicus curiae the Chamber of Commerce of the United States of America

BETH S. BRINKMANN
BRIAN R. MATSUI
Counsel of Record
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784

Counsel for amici curiae the Organization for International Investment and the Chamber of Commerce of the United States of America

June 30, 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In a securities fraud action brought under section 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), whether the running of the statute of limitations specified by 28 U.S.C. § 1658(b)(1), which provides a limitations period of two years "after the discovery of the facts constituting the violation," is triggered when a potential plaintiff is on notice that would reasonably prompt an inquiry into the possibility of fraud, including knowledge of proof that prior representations were false, or whether the period is delayed until the fraud would actually have been uncovered if inquiry had been made?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE COURTS OF APPEALS ARE HOPELESSLY DIVIDED ON WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN IN A SECURITIES FRAUD CASE AND THE UNIQUE POSITION TAKEN BY THE NINTH CIRCUIT IS PARTICULARLY ANTITHETICAL TO THE CORE PURPOSE OF THE STATUTE 6

A. The Ninth Circuit's Ruling Enlarges A Longstanding Division In The Circuits On When The Statute Of Limitations Period Is Triggered In A Securities Fraud Case 7

1. The circuits have long been split between those that hold the limitations period begins to run when a reasonable inquiry should have begun, those that hold it does not begin until such inquiry would have uncovered fraud, and those that choose between the two based on whether inquiry actually was made 7

TABLE OF CONTENTS – Continued

Page

2. The Ninth Circuit's ruling deepens the circuit split and finds no support in any other court of appeals decision 11

3. Because of the widespread conflict, the jurisdiction in which suit is filed is often outcome determinative 15

B. The Ninth Circuit's Ruling Undermines The Purposes Of The Inquiry Notice Rule And Statutes Of Limitations Generally 16

II. REVIEW IS NECESSARY IN ORDER TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE TO OUR CAPITAL MARKETS 17

A. Significant Securities Fraud Suits That Survive Dismissal Efforts Or Summary Judgment Impose Enormous Litigation Costs And Exert Tremendous Pressure To Settle On Defendants, Regardless Of The Merits 18

B. Meritless Securities Class-Action Suits Significantly Hurt The United States Capital Markets 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Blair v. Equifax Check Servs., Inc., 181 F.3d 832 (7th Cir. 1999) 20

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).....18, 19

Brumbaugh v. Princeton Partners, 985 F.2d 157 (4th Cir. 1993) 8, 15, 16, 17

Caviness v. Derand Res. Corp., 983 F.2d 1295 (4th Cir. 1993) 9, 10

DeBenedictis v. Merrill Lynch & Co., Inc., 492 F.3d 209 (3d Cir. 2007).....12, 13

Dodds v. Cigna Sec., Inc., 12 F.3d 346 (2d Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994).....8, 12, 13, 14

Franze v. Equitable Assurance, 296 F.3d 1250 (11th Cir. 2002).....8, 9, 12

Fujisawa Pharm. Co. v. Kapoor, 115 F.3d 1332 (7th Cir. 1997) 14, 16

Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc., 120 F.3d 893 (8th Cir. 1997).....9, 10

In re NAHC, Inc. Sec. Litig., 306 F.3d 1314 (3d Cir. 2002).....13

In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, 516 U.S. 867 (1995).....20

Jensen v. Snellings, 841 F.2d 600 (5th Cir. 1988).....8, 9

TABLE OF AUTHORITIES – Continued

Page

Klein v. Bower, 421 F.2d 338 (2d Cir. 1970) 8

LC Capital Partners, LP v. Frontier Ins. Group, 318 F.3d 148 (2d Cir. 2003) 10, 11, 15

Marks v. CDW Computer Ctrs., Inc., 122 F.3d 363 (7th Cir. 1997) 10

Mathews v. Kidder, Peabody & Co., 260 F.3d 239 (3d Cir. 2001) 11, 13

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) 18

New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004) 8, 10

Sterlin v. Biomune Sys., 154 F.3d 1191 (10th Cir. 1998) 8, 10, 11, 12, 14

Theoharous v. Fong, 256 F.3d 1219 (11th Cir. 2001) 14

Topalian v. Ehrman, 954 F.2d 1125 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992) 12

Tregenza v. Great Am. Communications Co., 12 F.3d 717 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994) 16

Young v. Lepone, 305 F.3d 1 (1st Cir. 2002) 10

STATUTES

28 U.S.C. § 1658 ..... 3, 4, 11, 16

28 U.S.C. § 1658(b) 7

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1658(b)(1) 2, 7, 9, 11

28 U.S.C. § 1658(b)(2) 16

OTHER AUTHORITIES

Fed. R. Civ. P. 12(b)(6) 15

Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991) 20

Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* (2007) 20, 21, 23, 24

Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* (2006) 23, 24, 25, 26

PricewaterhouseCoopers, *2006 Securities Litigation Study* 21

Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* (U.S. Chamber Institute for Legal Reform 2005) 22

H.R. Rep. No. 104-369 (1995) (Conf. Rep.) 19

BRIEF OF THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Organization for International Investment ("OFII") and the Chamber of Commerce of the United States of America ("Chamber") respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

OFII is the largest business association in the United States representing the interests of United States subsidiaries of multinational companies before all branches and at all levels of government. OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the country, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

---

[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, and counsel for *amici curiae* timely notified each party's counsel of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Chamber is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Amici and their members recognize the importance of the federal securities laws to deter and remedy wrongdoing to investors, but they also know that effective deterrence requires consistent and predictable application of the law. *Amici* and their members are concerned that inconsistent standards as to when a statute of limitations allows a securities fraud action (and the potentially unprecedented expansion of the statute of limitations in some circuits) has, and will, lead to further proliferation of securities fraud actions that will undermine the goals of our federal securities laws and threaten the health and stability of our capital markets.

The court of appeals ruling in this case potentially eliminates an otherwise valid statute of limitations defense in many securities fraud actions filed within the Ninth Circuit. Securities fraud actions are subject to a two-year statute of limitations "after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1). But, as Chief Judge

Kozinski explained in his dissent to the denial of rehearing *en banc* below: "If a securities defendant in a simple case like this cannot use the statute of limitations as a shield against the costs and hazards of trial, then no defendant can, and the statute of limitations Congress passed for 10b-5 cases is pretty much a dead letter in this circuit." Pet. App. 28a-29a.

Accordingly, *amici* and their members have a strong interest in this Court's review and reversal of the decision below to ensure evenhanded application of the two-year statute of limitations in securities fraud cases across the country.

SUMMARY OF ARGUMENT

I.

The courts of appeals are deeply divided over when the two-year statute of limitations for a securities fraud action specified in 28 U.S.C. § 1658 begins to run.

A. It is well-settled that if an investor knows of sufficiently ominous signals that would prompt a reasonable investor to inquire about the possibility of fraud regarding his investment, he is deemed to have "inquiry notice" and must begin a diligent investigation into the possibility of fraud. There is an acknowledged conflict between the circuits, however, on whether the statute of limitations begins to run when the investor is put on such inquiry notice, or

later when a reasonably diligent investigation would have actually uncovered the fraud.

The Ninth Circuit's ruling below deepened this longstanding split. In a significant departure from the preexisting authority from every other court of appeals to have addressed the issue, the Ninth Circuit held that even *actual* notice of the falsity of the defendant's prior representation does not, as a matter of law, obligate the investor to inquire whether the misrepresentation was fraudulent. Accordingly, in the Ninth Circuit, inquiry notice is triggered not by evidence of a misrepresentation, as it is in other circuits, but only by evidence of scienter—*i.e.*, an actual intent to defraud.

This division provides securities fraud plaintiffs in some circuits months or even years longer to bring suit than plaintiffs raising identical claims in other circuits. This entrenched conflict will not be resolved absent this Court's intervention.

B. The court of appeals ruling also is contrary to the well-established objectives of Section 1658 and statutes of limitations generally. The decision below provides investors with little incentive to conduct any investigation to reveal fraud, and it strips defendants, including *amici*'s members, of the ability to predict the latest point when any potential legal action could be brought.

II.

A. The Ninth Circuit's holding will have widespread implications because it cannot be limited to investor-broker securities fraud cases. It will also apply to class actions that are brought under the federal securities laws and that significantly threaten *amici*'s members. Indeed, many more securities class actions will survive a pretrial challenge on statute of limitations grounds under the Ninth Circuit's ruling.

The Ninth Circuit's opinion, left unchecked, will exacerbate the pressure already placed on securities class-action defendants, including *amici*'s members, to enter into sizable settlements, regardless of the merits of the claims. The bet-the-company nature of securities class actions and the ability of plaintiffs to demand abusive discovery already create greater incentives to settle than in other types of litigation. And this pressure—which has caused settlement values to increase substantially in recent years—is driven successively higher at each stage of litigation. The Ninth Circuit's opinion makes it more difficult for defendants to cut off stale claims at an early stage.

B. Moreover, the judgment below, by permitting cases to proceed to trial in circumstances where Congress clearly intended them to be barred by the statute of limitations, will increase the number of securities class-action defendants and thus deter capital investment necessary to the growth of the United States economy. Empirical analyses demonstrate that the absence of predictability and

certainty in the legal system drives foreign investment away from United States markets and toward markets with more stable legal rules.

ARGUMENT

I. The Courts Of Appeals Are Hopelessly Divided On When The Statute Of Limitations Begins To Run In A Securities Fraud Case, And The Unique Position Taken By The Ninth Circuit Is Particularly Antithetical To The Core Purpose Of The Statute

Even before the Ninth Circuit entered the fray, ten other circuits were divided as to whether the limitations period for a securities fraud claim begins to run when the plaintiff knows of facts that would cause a reasonable person to inquire whether he has a fraud claim, or later when a reasonably diligent investigation would have actually uncovered the fraud. The Ninth Circuit now has widened that already-entrenched split by holding that even *actual* proof that prior representations were false is not sufficient to obligate the investor to inquire whether such known misrepresentations give rise to a securities fraud claim.

A. The Ninth Circuit's Ruling Enlarges A Longstanding Division In The Circuits On When The Statute Of Limitations Period Is Triggered In A Securities Fraud Case

1. The circuits have long been split between those that hold the limitations period begins to run when a reasonable inquiry should have begun, those that hold it does not begin until such inquiry would have uncovered fraud, and those that choose between the two based on whether inquiry actually was made

Congress imposed on securities fraud actions a statute of limitations that requires actions to be brought within two years "after the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1).[2] Plaintiffs, however, in some circumstances want to intentionally delay such "discovery"—and not immediately bring suit—because they want to see if they might do well on the investment despite the possible fraud. But that would defeat the goal of the securities laws to protect the

---

[2] Section 1658(b) also imposes a five-year statute of repose that runs from the date of the violation and automatically cuts off a plaintiff's rights at the end of five years, irrespective of any potential tolling. Because the limitations period is based upon the "earlier" of the two periods, the five-year statute of repose is not at issue in this case.

market and other investors from fraud and is not allowed in any circuit.

Accordingly, a securities fraud plaintiff who possesses knowledge of sufficient ominous facts, termed "storm warnings," that would cause a reasonable investor to inquire further is on "inquiry notice" and has a duty to launch an investigation into whether fraud is afoot. *See, e.g.*, *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351-352 (2d Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994). Plaintiffs are not "free to ignore [signs] which would alert a reasonable investor to the possibility of fraud[ ]," nor is the plaintiff "permitted a 'leisurely discovery of the full details of the alleged scheme.'" *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988) (quoting *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970)). Inquiry notice is triggered "by evidence of the possibility of fraud, not full exposition of the scam itself." *Franze v. Equitable Assurance*, 296 F.3d 1250, 1254 (11th Cir. 2002); *see also Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993).

Although the circuits all have adopted some sort of "inquiry notice" standard, there is a well-recognized divergence between the circuits as to when the statute of limitations begins to run once a plaintiff is deemed to have inquiry notice. *See New England Health Care Employees Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003) (acknowledging existence of different approaches), *cert. denied*, 540 U.S. 1183 (2004); *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1199-1200 (10th Cir. 1998) (Although all "circuits generally apply an inquiry

notice standard[,] * * * [t]he circuits are not consistent * * * in their determination of exactly when the * * * limitations period accrues.").

In four circuits—the Fourth, Fifth, Eighth, and Eleventh—the statute of limitations begins to run when the plaintiff has inquiry notice and is obligated to investigate further. *See Franze*, 296 F.3d at 1255 (Once a plaintiff has "notice of the possibility of fraud, * * * the statute of limitations [is] triggered for their claims at that time."); *Great Rivers Coop. of Se. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 898-899 (8th Cir. 1997) (statute of limitations began to run when plaintiff read article that triggered duty to investigate); *Caviness v. Derand Res. Corp.*, 983 F.2d 1295, 1303 (4th Cir. 1993) ("limitation period [commences] when the plaintiff * * * has such knowledge as would put a reasonably prudent [investor] on notice to inquire"); *Jensen*, 841 F.2d at 608 ("'[S]torm warnings' * * * trigger the duty to inquire further and the running of the statute of limitations."). In those courts of appeals, once the potential plaintiff knows of facts that would alert a reasonable investor to conduct an inquiry, the plaintiff has two years under 28 U.S.C. § 1658(b)(1) to *both* diligently investigate and bring suit.

By contrast, four other circuits—the First, Sixth, Seventh, and Tenth—hold that inquiry notice merely obligates the investor to begin an investigation and does not immediately commence the running of the statute of limitations. In those circuits, the clock for bringing suit does not start ticking until a person conducting an investigation with reasonable diligence

would uncover the fraud. *See New England Health Care Employees Pension Fund*, 336 F.3d at 501 ("[L]imitations period begins to run when a plaintiff should have discovered, by exercising reasonable diligence, the facts underlying the alleged fraud."); *Young v. Lepone*, 305 F.3d 1, 9 (1st Cir. 2002) (same); *Sterlin*, 154 F.3d at 1201 (same); *Marks v. CDW Computer Ctrs., Inc.*, 122 F.3d 363, 368 (7th Cir. 1997) (same).[3]

Finally, two circuits—the Second and Third—have adopted a hybrid approach. When the limitations period begins depends on whether the plaintiff actually begins an investigation. If, and only if, the plaintiff actually begins an inquiry, then the statute of limitations period is not triggered until a reasonable person exercising due diligence would have uncovered the fraud. *See LC Capital Partners, LP v. Frontier Ins. Group*, 318 F.3d 148, 154 (2d Cir.

---

[3] Certain language in cases from the Fourth and Eighth Circuits, at first glance, might appear to indicate that the statute of limitations begins to run in those circuits only after the period for a reasonable investigation has concluded. *See Great Rivers*, 120 F.3d at 896 (limitations period begins if upon investigation, "reasonable person would have acquired actual notice of the defendant's misrepresentations"); *Cavness*, 983 F.2d at 1303 (same). But it is clear from the facts of those cases that the limitations period began when the plaintiff initially had inquiry notice rather than later when the investigation should have been completed. In any event, even if the Fourth and Eighth Circuits were shifted to another side of the split, the conflict amongst the courts of appeals would still require this Court's resolution.

2003); *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (applying same test in burden-shifting approach). If, however, the plaintiff does not conduct any inquiry despite the storm warnings putting him on inquiry notice, then the limitations period is triggered on the date that the duty to inquire arose. *See LC Capital Partners*, 318 F.3d at 154; *Mathews*, 260 F.3d at 252.

2. The Ninth Circuit's ruling deepens the circuit split and finds no support in any other court of appeals decision

When presented with these three different approaches to application of Section 1658's provision that the statute of limitations begins upon "discovery of the facts constituting the violation," 28 U.S.C. § 1658(b)(1), the Ninth Circuit "part[ed] company with ten other circuits," Pet. App. 39a, to find itself, according to Chief Judge Kozinski's dissent, once "again," "out in left field," *id.* at 28a.

Although the Ninth Circuit purported to adopt the "inquiry-plus-reasonable-diligence test used by the Tenth Circuit," Pet. App. 15a (citing *Sterlin*, 154 F.3d at 1201), the court actually announced a new standard that finds no support in any other decision from the courts of appeals. Under the Ninth Circuit's standard, not even objective proof, known to the plaintiff, of the falsity of the defendant's prior representation triggers inquiry notice as a matter of

law unless, and until, the plaintiff has adequate indication that the prior representation was made with scienter. *See id.* at 16a, 20a-21a.

Indeed, the ruling below demonstrates that the respondent had *actual* notice of the alleged misrepresentation that is the basis of her fraud suit. Respondent's allegation is based on her contention that petitioner guaranteed that her money would be invested "in such a fashion that [she] would receive $15,000 a month from the profit of the investment and that [the defendants] would not touch the principal," *id.* at 4a (second alteration in original), but the documents that respondent signed, on the same day that she was given that guarantee, directly contradict the guarantee. The documents "explicitly stat[ed] that [her] account was subject to market risk and that 'no person has represented to [her] that any particular result can or will be achieved.'" *Ibid.*

In most circuits, this, alone, would be sufficient to place the investor on inquiry notice of the fraud and to start the running of the statute of limitations. *See Topalian v. Ehrman*, 954 F.2d 1125, 1134-1135 (5th Cir.) (plaintiff's signing of subscription agreement disclosing investment's speculative nature and contradicting prior promises of low risk triggered limitations period), *cert. denied*, 506 U.S. 825 (1992); *see also DeBenedictis v. Merrill Lynch & Co., Inc.*, 492 F.3d 209, 216 (3d Cir. 2007) (same); *Franze*, 296 F.3d at 1254-1255 (same in Eleventh Circuit); *Dodds*, 12 F.3d at 351 (same in Second Circuit).

Moreover, even if such documentation were not, alone, adequate to put the investor on notice to inquire further, every other circuit besides the Ninth would have concluded that respondent's knowledge of the precipitous decline in the value of the principal, *see* Pet. App. 5a, was sufficient to place her on inquiry notice. Respondent does not dispute that, within a year of her initial investment, she began receiving account statements showing that her principal certainly had been "touched"—there were ultimately 30 such statements in total—despite the guarantee allegedly made to her. *Ibid.* And within two years, respondent had lost more than 60 percent of her original investment. *See ibid.* That decline in value is directly contrary to the no-risk investment she claims she was promised. *See Mathews*, 260 F.3d at 254. Every other circuit would "have [had] no problem concluding that" respondent's losses constituted "ominous storm warnings" that put her on notice to inquire. *Ibid.*; *see also DeBenedictis*, 492 F.3d at 216 ("accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased" triggers inquiry notice (quoting *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1326-1327 n.5 (3d Cir. 2002))). And, moreover, every other circuit would have concluded that the statute of limitations began to run then, or shortly thereafter, when respondent had proof that the representations allegedly made to her were false.

Chief Judge Kozinski described the ruling below as having "effectively writ[ten] the statute of limitations off the books." Pet. App. 39a. Under the ruling, even actual proof, known to the investor, that the defendant's representations were false does not obligate the investor to conduct any further inquiry because, according to the Ninth Circuit, such falsity somehow does not raise the possibility that the defendant made the false representations with scienter. *Compare* Pet. App. 20-21a (despite promise that principal would not be depleted, "we cannot say that a declining account balance, in and of itself, would have spurred a reasonable investor to further inquire whether he or she had been *defrauded*."), *with Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001) (stating that "[i]nquiry notice is triggered by evidence of the *possibility* of fraud, not full exposition of the scam itself" (citation omitted)); *see also Sterlin*, 154 F.3d at 1202 n.19 (Tenth Circuit explaining that "inquiry notice, which is triggered by evidence of the *possibility* of fraud, may exist before a reasonable investor is able to discover the facts underlying the alleged fraud." (emphasis added)); *Dodds*, 12 F.3d at 352 (Second Circuit applying same standard); *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1335 (7th Cir. 1997) (applying same standard).

The decision below cannot be justified by the fact that the ruling was at the summary judgment stage either, where inferences are drawn in the plaintiff's favor. Other circuits have consistently held that, "[w]here the underlying facts are undisputed, the

issue of whether the plaintiff has been put on inquiry notice can be decided as a matter of law." *Brumbaugh*, 985 F.2d at 162; *see also LC Capital Partners*, 318 F.3d at 156 (where facts pleaded were sufficient to place plaintiff on inquiry notice, dismissal under Rule 12(b)(6) is appropriate). Indeed, the Ninth Circuit's weakening of the summary judgment standard may be the most troubling aspect of its decision. Left unchecked, the holding, as applied in class-action securities fraud cases, will make it easier for such cases to survive summary judgment and for the plaintiffs to extract large settlements, even where the claim is clearly barred on limitations grounds. *See infra* at pages 17-21.

3. Because of the widespread conflict, the jurisdiction in which suit is filed is often outcome determinative

The petition demonstrates that if respondent had brought this action in, for example, Texas or Florida, the statute of limitations would have begun to run on June 7, 1999, when respondent signed account documentation that directly contradicted the alleged promise of a no-risk investment. Had she brought it in Massachusetts or Colorado, the clock would have begun ticking in February 2000, or shortly thereafter, when her knowledge of the declining value of her account made it abundantly obvious that the purported guarantee that her principal would not be touched was false. In each of those States, the district court would have dismissed the case on summary

judgment based on the statute of limitations defense as a matter of law, and precluded the need for the enormous expense of a jury trial. But under the ruling below, the limitations period may not have accrued until July 11, 2001, Pet. App. 20a, giving the plaintiff more than two additional years than she would have had to bring suit in Texas or Florida, and well over a year more than she would have had in Massachusetts or Colorado.

B. The Ninth Circuit's Ruling Undermines The Purposes Of The Inquiry Notice Rule And Statutes Of Limitations Generally

The Ninth Circuit's ruling that rests on the discovery of scienter is contrary to the purposes of the inquiry notice rule that underpins Section 1658. The inquiry notice rule is necessary to discourage investors from waiting until the full fraud reveals itself and to instead "tak[e] the actions necessary to bring the fraud to light." *Brumbaugh*, 985 F.2d at 162. Without such a rule, a potential plaintiff is permitted to wait out the five-year statute-of-repose period, *see* 28 U.S.C. § 1658(b)(2), to see if the investment rebounds despite likely fraud. *See, e.g.*, *Fujisawa*, 115 F.3d at 1337; *see also Tregenza v. Great Am. Communications Co.*, 12 F.3d 717, 722 (7th Cir. 1993) ("If the stock rebounded from the cellar [the plaintiffs] would have investment profits, and if it stayed in the cellar they would have legal damages. Heads I win, tails you lose."), *cert. denied*, 511 U.S.

1085 (1994). That is now the situation in the Ninth Circuit, where the ruling below diminishes the incentive for investors to investigate the possibility of fraud after they have been presented with proof of the misrepresentation.

The ruling also undermines the role of statutes of limitations generally because they are supposed to provide a defendant "the security of knowing when legal action against him has been foreclosed." *Brumbaugh*, 985 F.2d at 162. But with the pervasive circuit split on the issue, the limitations period for a securities fraud claim may vary by years, depending on the geographic locale.

II. Review Is Necessary In Order To Resolve An Issue Of National Importance To Our Capital Markets

The ruling below cannot be constrained to the particular facts of this case. Because, as Chief Judge Kozinski noted in dissent, the ruling below does not even provide a statute of limitations defense in a simple investor-broker action where there was *actual* notice, Pet. App. 28a, the Ninth Circuit's decision will have widespread ramifications to major, high-stakes securities actions often filed on a class-wide basis against publicly traded companies, including *amici*'s members, in district courts within the Ninth Circuit.

In the typical securities class action, the alleged misrepresentation is made in a registration statement or quarterly or annual report, and a decline in stock value may be less of an indicator of

securities fraud. But in this case, the decline in value of respondent's original investment directly contradicted the representation allegedly made to her, which plainly created a strong suspicion of fraud. Thus, if the statute of limitations is no bar to respondent's case, it would likely not be a bar in many other securities fraud cases, including class actions, under the Ninth Circuit rule.

A. Significant Securities Fraud Suits That Survive Dismissal Efforts Or Summary Judgment Impose Enormous Litigation Costs And Exert Tremendous Pressure To Settle On Defendants, Regardless Of The Merits

This Court has repeatedly recognized that securities litigation "presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 80 (2006) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975)). "Even weak cases * * * may have substantial settlement value * * * because '[t]he very pendency of the lawsuit may frustrate or delay normal business activity.'" *Ibid.* (quoting *Blue Chip Stamps*, 421 U.S. at 740). And the pressure to settle increases at each successive stage of litigation at which the action is permitted to proceed. For this reason, it is vital that the standard for the accrual of the statute of limitations in securities actions be sufficiently rigorous to cut off at

an early stage of litigation those actions that are clearly barred.

Once a securities case survives a motion to dismiss, *amici*'s members have found that the potential for the plaintiff to abuse the liberal discovery process is much greater than in other types of litigation. *See Blue Chip Stamps*, 421 U.S. at 741. As a result, it is often more economical for a defendant to settle than to outlay costs associated with discovery, even when it is likely that the defendant will prevail on a limitations defense either at summary judgment or at trial.

But the direct costs (*i.e.*, legal fees) associated with abusive discovery are only one aspect of the wider problem. Depositions and other extensive discovery often draw the attention of key employees of *amici*'s members away from the business's day-to-day operations and also its long-term strategies. *See* H.R. Rep. No. 104-369, at 37 (1995) (Conf. Rep.). Where a securities action that will ultimately be barred by a limitations defense is permitted to proceed beyond dismissal, "it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value," and it exacts "a social cost rather than [provides] a benefit." *Blue Chip Stamps*, 421 U.S. at 741.

And where a court permits a securities case to proceed beyond the summary judgment stage, as the

Ninth Circuit did in the instant case, the settlement value increases significantly. It is often the case that "corporate executives are unwilling to bet their company that they are in the right in [such] big-stakes litigation." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.) (If class is certified, even where statute of limitations for many plaintiffs may have run, defendants "may not wish to roll the[ ] dice. That is putting it mildly. They will be under intense pressure to settle."), *cert. denied*, 516 U.S. 867 (1995). The result, all too often, of permitting securities claims that should have been barred by limitations to proceed beyond summary judgment, is the enablement of "blackmail settlements." *Rhone-Poulenc Rorer*, 51 F.3d at 1298; *see also* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 Stan. L. Rev. 497 (1991).

Indeed, such fears over bet-the-company securities litigation have recently driven settlement values for securities class-action suits to soar. Such settlements totaled $3.5 billion in 2005 alone ($9.7 billion, if WorldCom-related settlements are included). Michael R. Bloomberg & Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* 74 (2007) (Bloomberg-Schumer Report), available at http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20_FINAL.pdf. This figure (excluding the WorldCom settlements) represents a 15-percent

increase over 2004 and an increase of 70 percent over 2003. *Ibid.* What's more, from 1997 to 2004, the average settlement nearly doubled from $14.3 million to $26.5 million, while the number of settlements rose from 14 to 113. *See id.* at 75. The trend has been especially pronounced for foreign issuers, which reached settlements totaling $2.4 billion in 2006, a 78 percent increase over 2005 ($1.35 billion), more than three times the total settlements by foreign issuers in 2004 ($733 million), and nearly five times the 2003 settlements ($495 million). PricewaterhouseCoopers, *2006 Securities Litigation Study* 62, available at http://www.pwc.com/extweb/pwcpublications.nsf/docid/a89d7b2aa156e4f1852572ce005bbd54.

As discussed above, the Ninth Circuit's standard for the statute of limitations in securities fraud cases would likely permit many more otherwise stale cases to survive a limitations challenge in a motion to dismiss or motion for summary judgment. Such a standard would further exacerbate the already hostile litigation environment for publicly traded businesses, including *amici*'s members.

Significantly, this case presents an ideal vehicle for the Court to resolve the circuit split precisely because it is *not* a class-action. Because most securities fraud class actions do not go to trial due to the significant pressure to settle after summary judgment is denied, the instant case provides this Court with a unique opportunity to address a pressing legal question that often evades judicial review.

B. Meritless Securities Class-Action Suits Significantly Hurt The United States Capital Markets

1. It comes as no surprise that meritless securities actions that should not survive a motion to dismiss or summary judgment impose a deleterious effect on the United States economy. On average, securities class actions reduce a defendant company's equity value by 3.5 percent. Anjan V. Thakor, *The Unintended Consequences of Securities Litigation* 14 (U.S. Chamber Institute for Legal Reform 2005), available at http://www.heartland.org/pdf/18330.pdf.

Empirical studies have shown that smaller companies, which are "the economy's engine for innovation and growth," suffer a disproportionate loss of equity value, in part because they are less able to achieve economies of scale in litigation costs. *Id.* at 9-10. Abusive securities litigation destroys far more of the defendants' wealth than it creates for plaintiffs. *Id.* at 14. And reduction of equity causes companies to spend less on capital investment, which "has obvious implications for job creation and economic growth," *ibid.*, not to mention the effect on productivity, research and development, and innovation that have sustained America's economic prowess.

Abusive securities litigation in the United States has not escaped the attention of the international business community, including *amici*'s members. It has been a driving force behind a growing perception

that the United States legal system is more hostile for business than many of our international competitors, most notably the United Kingdom. *See* Bloomberg-Schumer Report at ii. The result has been a rapid decline in the competitiveness of the United States capital markets, driven in large part by foreign firms' concerns over shareholder litigation in the United States. *See* Committee on Capital Markets Regulation, *Interim Report of the Committee on Capital Markets Regulation* x (2006). It is clear that "foreign companies [are] staying away from US capital markets for fear that the potential costs of litigation will more than outweigh any incremental benefits of cheaper capital." Bloomberg-Schumer Report at 101. The consensus is that "the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business—and driven away potential investors." *Id.* at ii.

2. This Court's intervention here is necessary to increase the predictability of the United States legal system, a key factor in driving foreign investment into the Nation's economy.

A survey of more than 350 senior executives in the financial services sector revealed that "a fair and predictable legal environment was the second most important criterion determining a financial center's competitiveness," but the prevalence of securities class-action litigation and settlements contributed to the survey respondents' belief that "the US legal

environment is less fair and less predictable than the UK environment." *Id.* at 16.[4] Indeed, many corporations now choose English law, rather than United States law, to govern their international commercial contracts, precisely because English law is seen as far more predictable. *Id.* at 77.

The existence of at least four different standards within the United States governing the statute of limitations in securities fraud cases is the exact opposite of the fair and predictable legal environment for which foreign investors search when making investments. The unpredictability associated with a stale securities class action surviving summary judgment in California, when it would have been dismissed at an early stage of litigation had it been brought in Texas, frustrates foreign investors. This is especially true given the fact that the average public company in the United States has nearly a 10 percent probability of facing at least one securities class action in any five-year period. *Interim Report* at 74. The uncertainty that now exists over the statute of limitations for securities class actions—uncertainty that only this Court can resolve by granting

---

[4] Only about 15 percent of survey respondents preferred the United States legal system, while more than 40 percent perceived the U.K. legal system as outperforming the United States in terms of predictability and fairness. *Id.* at 77.

certiorari—creates a cautious environment for foreign companies wishing to invest capital in publicly traded companies in the United States.

Empirical evidence supports the widespread perception, held by *amici*'s members, that the enormous litigation costs of securities actions in the United States and the lack of predictability in the United States legal system are hurting the economy. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings—so-called global IPOs." *Interim Report* at 29. The United States market share of global IPOs has been rapidly declining throughout this decade. In 2000, approximately 50 percent of the funds raised through global IPOs was raised in the United States, but by 2005 that figure had steadily sunk to just 5 percent. *Id.* at 29-30. The trend continued in 2006, in which 9 of the 10 largest IPOs occurred outside the United States, and the United States' share of global IPO funds raised remained less than 10 percent. *Id.* at 30. And the phenomenon is not isolated to foreign companies; domestic companies have begun to "abandon[] the U.S. equity markets to list in London," where it is much less expensive to raise capital. *Id.* at 32. This drop in the domestic market share, unfortunately, is not the result of cyclical behavior but a symptom of declining competitiveness, *ibid.*, triggered in no small part by the burden of securities litigation in the United States.

While the public equity markets in the United States are in decline, the *private* equity market—where companies are shielded from most securities liability—has become the "market of choice," for foreign companies wishing to raise capital in the United States, even though the cost of doing so is more expensive. *Id.* at 45-46. The "regulatory and litigation burden is an important factor" driving the companies into the private market. *Id.* at 46. Because, "[g]enerally, only institutions and wealthy individuals can participate directly" in the private equity market, individual investors are losing opportunities to invest in these companies. *Id.* at 34. Consequently, "the average investor [is left] in increasingly less liquid and more expensive markets than those enjoyed by institutions and the wealthy." *Ibid.*

This Court should intervene to establish a degree of predictability in an area of law that substantially affects the United States economy. Unless this Court resolves the deep divide between the circuits, the decline in the nation's competitiveness among public equity markets will surely continue, and foreign investment in the United States will be further deterred.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for amicus curiae the Chamber of Commerce of the United States of America

BETH S. BRINKMANN
BRIAN R. MATSUI
Counsel of Record
MARC A. HEARRON
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-8784

Counsel for amici curiae the Organization for International Investment and the Chamber of Commerce of the United States of America

June 30, 2008